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IN THE

Supreme Court of the United States

October Term, 1967

NO. 877

ANDREW NICHOLSON

v.

C. D. CALBECK, DEPUTY COMMISSIONER, ET AL

PETITION FOR WRIT OF CERTIORARI

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NO._____

ANDREW NICHOLSON

v.

C. D. CALBECK, DEPUTY COMMISSIONER, ET AL

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Andrew Nicholson, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

Opinions Below

The opinion of the United States District Court for the Southern District of Texas, Houston Division, was rendered on October 31, 1966, and is reported in 266 F. Supp. 103.

The opinion of the Court of Appeals for the Fifth Circuit was rendered on October 31, 1967, and is as yet unpublished. A copy of that opinion is appended as "Appendix A."

Jurisdiction

The opinion of the Court of Appeals for the Fifth Circuit was rendered on October 31, 1967.

The jurisdiction of this Court to review the judgment complained of by writ of certiorari is conferred by 28 U.S.C.A. 1254(1) and 2101(c).

Constitutional Provision and Statutes Involved

Article 1, Section 8: "The Congress shall have Power * * * to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof."

Article 3, Section 2: "The judicial Power shall extend * * * to all cases of admiralty and maritime jurisdiction."

The Longshoremen's and Harbor Workers' Compensation Act as amended, 33 USCA 901, et seq, provides in its pertinent parts as follows:

"Section 902. DEFINTIONS.

When used in this chapter—

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, * * *

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any drydock).

"Section 903. COVERAGE.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but

only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

"Section 904. LIABILITY FOR COMPENSATION.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under Sections 907-909 of this title.

"Section 920. PRESUMPTION.

In any proceedings for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter."

QUESTION PRESENTED

Whether a longshoreman, injured while temporarily on the pier, is entitled to federal compensation, where the pier, as found by the Deputy Commissioner, was "upon, over or above navigable waters of the United States," and where the injury was caused by the hatch beams of the vessel during the loading of the vessel.

STATEMENT OF POSITION

Petitioner, the injured employee, contends that the Deputy Commissioner, the District Court and Court of Appeals erred in holding that his injury did not come within the provisions of the Longshoremen's and Harbor Workers' Compensation Act in view of the following findings of fact by the Deputy Commissioner:

FINDINGS OF FACT

"1. On May 26, 1960, the employee above named was in the employ of the employer above named, whose address was 324 Shell Building, Houston, Texas, in the Eighth Compensation District. The employer was subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer for compensation under the said Act was insured by the Texas Employers' Insurance Association.

2. On the said day the employee herein sustained injury resulting in disability, while performing service as a longshoreman for the employer upon a dock, wharf, or pier and hereafter referred to as 'dock.' On said day said stevedoring work on the S/S 'MARY SOPHIA' was being performed by the Crown Stevedoring Company. The said dock was upon, over or above navigable waters of the United States. Said dock was erected on pilings and concrete blocks which rested in the bed of navigable waters of the United States. The inshore edge of the dock is attached to the outboard edge of the employer's warehouse, a portion of which likewise is upon, over or above navigable waters of the United States so that the inshore edge of the dock is not attached to or supported by land. In preparing the vessel to load some cargo, some 'tween deck beams were placed out on the dock because there was no place on the vessel to stow the beams, as the hatch cover was removed. A pallet was placed on the dock and the first beam placed on its side on the pallet.

3. Later in the day, it became necessary to shift the vessel. Rather than place the beams back on the vessel to be shifted with the vessel itself, forklifts were used to pick up the beams and thus carry them down the dock to the new position of the vessel. The employee proceeded on down the dock to where the vessel was shifted. As he reached a point

about midway of the two ends of the beams, one of the fingerlifts hit a railroad track on the dock which caused the loads to bounce. The said beams were part of the ship's gear used to cover up the hatch openings.

4. The employee sustained his injury while assisting in moving portions of the vessel (its hatch beams) to a new loading location for the vessel alongside the said dock. As two of the employee's fellow gang-members were moving the beams along the dock by means of forklifts, the beams slid from their resting place on the forklifts, striking employee on the back of his legs.

5. The employee sustained an above-the-knee amputation of the right leg. The left lower leg, below the knee, the skin over the middle half of the leg was very thin. There were several small areas where the skin had been broken and adhered. The skin adhered or stuck to the tibia or leg bone. There was a well-healed, curved surgical incision on the middle third at the front of the leg. There was marked tenderness immediately below this. There was a slight swelling of the left foot in the metatarsophalangeal joint, where the little toe joins the foot, which was dislocated. The range of motion of the ankle was limited to ten degrees. There were healed fractures of the first, second, and fourth metatarsals with mal or angular union and dislocation of the little toe on the metatarsal.

6. The employee cannot stand properly on the left foot without crutch or cane. He cannot do any significant amount of manual labor. The employee is 63 years of age. His work experience is limited to manual labor and his education extends only to the third grade. Following the injury the employee was incapable of performing his pre-injury work and therefore he had suffered an impairment of his wage-earning capacity, i.e.: permanent total disability.

7. It is common practice in the Port of Houston for some longshoremen to work on the dock and later on the vessel or first on the vessel and later on the dock. There is an interchange of such work. The employees report to the Union Hall for hiring. Any time a gang is called to work general cargo, some members of the gang may work on the vessel and some on the dock, but the employees of the gang do not know at the Union Hall whether the work assignment is to be on the dock or on the vessel. After the gang reaches the vessel, they learn what work is to be done, and the work assignment is then given. There is no difference in the rate of pay of the gang except for the foreman, whether they are working on the vessel or on the dock, but there might be a pay differential depending on the type of cargo handled.

8. At the time of the employee's injury the employer had other employees who were engaged in maritime employment upon the navigable waters of the United States.

9. Longshore work includes the loading or unloading of cargoes or moving or handling the same on any dock, platform or place or in any warehouse or other place of storage. This is a dockside accident that arose out of and in the course of the employee's employment. At the time of the employee's injury, he was engaged in service connected with the loading of a vessel. Taken as a whole, the accident occurred on the dock which was a means, or connecting link, in furnishing ingress to and egress from the said vessel.

10. Written notice of injury was not given to the employer within thirty days, but the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice. The employer furnished the employee with medical treatment, etc., in acordance with the provisions of Sec-

tion 7(a) of the said Act. The average weekly wage of the employee at the time of injury was $94.46. He was not paid full wages for day of injury.

11. As a result of the injury, the employee became wholly disabled on May 26, 1960, and such disability is continuing and is permanent.

12. The employer and the insurance carrier have paid $6,160.00 as disability benefits under the Texas Workmen's Compensation Act, for which they are entitled to take credit.

Upon the foregoing findings of fact, it is ORDERED by the Deputy Commissioner that the claim for compensation be and it is hereby REJECTED for the following reason:

There is no authoritative determination that a dockside accident comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act."

REASONS RELIED UPON FOR GRANTING THE WRIT

1. The decisions below are contrary to the opinion of this Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 82 S.Ct. 1196.

2. If this Honorable Court did not rule on this question of Congressional intent in the *Calbeck* case, then the question here presented is one on which the Court has not yet written but should do so since it is a question of great importance to a large segment of the waterfront work-force of this country. The effect of the decisions below is to attribute to Congress an intention to exclude from coverage the 25% of all injuries to longshore employees sustained on navigable waters which happen to occur on wharves or piers as the longshoremen work back

and forth between the wharf and the ship loading and unloading cargo.[1] The insurance industry itself has permitted no such distinction in that it requires the payment of the very same premium for *all members* of the longshore gang assigned to the vessel whether working on the vessel or on the dock.

3. In so far as the Circuit Court relied upon its decision in *Travelers Insurance Company v. Shea and McCollough,* decided August 9, 1967, (copy of opinion attached as "Appendix B") and presently pending on an application for writ of certiorari before this Court, the decision is contrary to the following opinions of this Court; *U. S. v. Appalachian Power Co.,* 311 U.S. 377, 61 S.Ct. 291; *Economy Light Co. v. U. S.,* 256 U.S. 113, 41 S.Ct. 409.

ARGUMENT

A. Legislative History

In response to *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524 (1917), which decided that a state workmen's compensation statute could not be applied to a maritime injury where there was no "local" concern because of the threat to "uniformity"; *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 40 S.Ct. 438 (1920), which struck down the initial legislative effort (Act of October 6, 1917, 40 Stat. 395) to permit maritime workers a recovery under a workmen's compensation statute because matters involving maritime contracts of employment were not of local concern, and the State could not be allowed by Congress to "declare the rights and liabilities incident to maritime employment" (id at 166);

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1. 42 New York Univ. L.J. 331, 344 footnote 114 (see also footnote 67 at p. 337).

Washington v. Dawson, 264 U.S. 219, 44 S.Ct. 302 (1924), which struck down Congress' second effort to have state compensation statutes apply to shore-based maritime employments because the statute was just another effort to permit states to declare liabilities "incident to maritime employment." Id at 226; the Federal Congress enacted the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A., Sec. 901, et seq, hereinafter referred to as the Act.

As originally drafted, this Act was limited in application to injuries occurring within the traditional maritime tort jurisdiction and did not include those broader matters of maritime contract jurisdiction. This draft was not designed to cover all injuries in maritime employment on navigable waters.

Original identical bills, S. 3170 and H.R. 9498, introduced in February 1926, provided federal coverage only for those maritime-employment injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce." An attorney for the unions, testifying in support of the original bill, explained that the sole test of maritime tort jurisdiction was the place of the injury and thus longshoremen injured on wharves or docks in the course of marine employment could resort to state compensation and did not require federal protection. See Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., March 16, and April 2, 1926, pp. 29-31.

However, this limited original concept of federal compensation was shown to be unworkable because longshoremen and repairmen did work back and forth between

the wharf and the ship during the course of their maritime employment. The maritime employee, therefore, would be constantly passing back and forth between federal and state compensation with each being exclusive of the other.

Mr. L. B. Clark, testifying for the Labor Department, pointed out that longshoremen and repair people in the course of their maritime employment on navigable waters constantly worked back and forth between the ship and the dock. He further pointed out that Congress had the power to regulate maritime employment contracts and that a law could be drafted to provide federal compensation for all injuries to maritime employees for injuries "on the dock, on the bridge and in the ship." Senate Hearings, p. 40, 1926 A.M.C. 1488, 1505-1506.

Employer representatives appear to have objected to the original exclusory language on the ground that it was a potential source of litigation as to which compensation law would apply. Senate Hearings, pp. 57, 91, 95. A statement submitted by Henry Hunter, representing the Council of American Shipbuilders and the New York and New Jersey Drydock Association, urged that any bill enacted "should include all maritime employment under the admiralty jurisdiction." Senate Hearings, p. 95.

The Senate Hearings were concluded on April 2, 1926, and the House commenced its consideration of the bill. Most witnesses were, of course, the same. Mr. Hunter was somewhat more definite in his statement before the House in that he stated that *the bill enacted should include all injuries in maritime employment.* See Hearing on H.R. 9498, House Judiciary Committee, 69th Cong., 1st Sess., April 22, 1926, p. 65.

The necessity of expanding the original jurisdictional concept which limited application of the bill to injuries occurring within the admiralty tort jurisdiction was further emphasized by Cletus Keating speaking for the American Steamship Owners Association. He stated that the bill's reference to injuries "on a place within the admiralty jurisdiction" was not adequate to accomplish the intended task. He found it difficult to conjure a formula covering all injuries to men in maritime employment working back and forth between the ship and the wharf. However, he did add: "I think that coverage ought to be very carefully considered from the standpoint of jurisdiction. *We want to be sure that everybody gets in under those words.* And I am not sure that they do." House Hearing, p. 101.

One conclusion can reasonably be reached from the testimony at the Hearings: Both employer and employee representatives pressed Congress to broaden not narrow the scope of federal compensation. The testimony thus made it plain that there was a difficult problem in drafting language to cover all injuries to employees in maritime employment on navigable waters. Obviously, Congress had to abandon maritime tort jurisdiction as its jurisdictional guideline. A ready substitute was admiralty contract jurisdiction, but drawn to exclude employment of a maritime character but obviously of completely "local concern," such as office employees, freight handlers, etc., without using the phrase "local concern."

The redrafted bill was reported from committee on June 2, 1926. S. Rep. No. 973, 69th Cong., 1st Sess., p. 2. The committee obviously had sought to broaden coverage. The original bill's definition of an employer liable for federal compensation was "a person engaged in any employment covered by this Act." The amended version substituted "an employer any of whose employees are employed in

whole or in part upon the navigable waters of the United States (including any dry dock)." The expansion of the jurisdictional concept is here most dramatically demonstrated. Section 3 of the original bill had founded jurisdiction upon maritime tort jurisdiction in that the injury was required to have occurred "on a place within the admiralty jurisdiction of the United States, except employment of local concern * * *." The amended version substituted "upon the navigable waters of the United States (including any dry dock)." Notable aslo is the fact that the tort concept of "fault" was specifically eliminated in Section 904(b). Original Section 5 made the federal act exclusive of state laws. The amendments eliminated that provision and made the compensation remedy exclusive only of suits for damages.

Considering the impact of these amendments, it seems clear that the Committee had indeed responded to the urgings of union and employer groups. The jurisdictional or regulatory base of the Act was changed from maritime torts to maritime contracts. However, because the committee reports did not contain any explanation, one can only speculate as to the real intent. Nevertheless, a literal reading of the amended language leads inexorably to the conclusion that all maritime-employment injuries are covered regardless of whether the particular injury occurred aboard ship or on a wharf over, above and upon navigable waters or a graving dock on dry land.

The final explanation of the bill by Congressman LaGuardia absolutely confirms this broad intent of Congress:

> "Mr. Speaker, it is quite possible to explain the purpose and necessity of this bill in two minutes. * * * Owing to our dual form of government we find that longshoremen are employed by companies or individuals engaged in foreign or interstate com-

> merce, and therefore there is some question whether or not state law could be made applicable to them. In order to meet this situation, it is necessary to pass a federal law. This is what they are doing now. This law simply gives the longshoremen the benefit of up-to-date legislation to cover injuries sustained in the course of their employment. That is all there is to it." (68th Cong. Rec. 5414).

This final statement of intent surely overrides a one-sentence inconsistency appearing nine months earlier at page 16 of Senate Report No. 973. Moreover, it would be incongruous to attribute to Congress an intent to deal with only 75% of the problem (75% of the injuries occur on the ship and 25% on the dock). Indeed the insurance industry has extracted the same premium from the employer whether the member of the gang works on the ship or the dock.

B. JUDICIAL INTERPRETATION

The legislative history of the Act was reviewed by this Court in *Calbeck v. Travelers*, supra, where the Court found a congressional intention *"to exercise to the fullest extent all the power and jurisdiction it had over the subject matter"*[2] (emphasis supplied) so as "to provide compensation for all injuries sustained by employees on navigable waters, whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law."[3]

The Court, quoting with approval from *DeBardelben Coal Corp. v. Henderson* (5th Cir.), 142 F.2d 481, 483-484, added:

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2. 370 U.S. at p. 130, 82 S.Ct. at p. 1205.

3. 370 U.S. at p. 117, 82 S.Ct. at p. 1198.

"* * * the federal compensation laws should be liberally construed to cover *every case where the injury occurred on navigable waters and where within the rule of (Jensen)* * * * the action would have been in admiralty* * * *.

"* * * The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, *leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter.*

"* * * It is sufficient to say that Congress *intended* the compensation act *to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery * * * may not validly be provided by State law' was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy, but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers* * * *. IN THE APPLICATION OF THE ACT, THEREFORE, THE BROADEST GROUND IT PERMITS OF SHOULD BE TAKEN. NO GROUND SHOULD BE YIELDED TO STATE JURISDICTION IN CASES FALLING WITHIN THE PRINCIPLE OF THE JENSEN CASE MERELY BECAUSE THE SUPREME COURT, BEFORE THE FEDERAL COMPENSATON LAW WENT INTO EFFECT DID HERE A LITTLE, THERE A LITTLE, CHIP AND WHITTLE JENSEN DOWN IN THE MASS OF CONFLICTING AND CONTRADICTORY DECISIONS IN WHICH IT ADVANCED AND APPLIED THE 'LOCAL CONCERN' DOCTRINE TO SAVE THE EMPLOYEES INJURED ON NAVIGABLE WATERS, AND OTHERWISE REMEDILESS, THE REMEDIES STATE COMPENSATION LAWS AFFORDED THEM* * * *."[4] (All emphasis ours)

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4. 370 U.S. at p. 130, 82 S.Ct. at p. 1205.

C. EXTENT OF CONGRESSIONAL AUTHORITY

In light of this authoritative holding that Congress exercised its fullest authority in delineating coverage under the Act, it is sufficient here to determine whether Congressional authority extends to injuries occurring on the wharf.

In order to resolve this question, it must be determined whether the judicial authority of the United States courts extends to injuries on the wharf. For as explained by Judge Brown in The City of Norwalk:

> "Aside from the grant of power to regulate foreign and interstate commerce, the Constitution, it must be remembered, contains no direct grant to Congress of legislative power over the maritime law. Its authority upon that subject, over and above the power derived from the commercial clause, though no doubt now firmly established, (Butler v. Steamship Co., 130 U.S. 527; In re: Garnett, 141 U.S. 1, 14) rests upon implication only.
>
> "The grounds of this implication, briefly stated, are that the Constitution [illegible] extending the judicial power to all cases of [illegible]ume jurisdiction, presupposes a certain bo[illegible] maritime law as its necessary attendant; that [illegible] law is not only a matter of interstate and inter[illegible]national concern, but requires, also, harmony and consistency in its administration, and hence cannot be subject to defeat or impairment of liability to the diverse legislation of numerous states; and that Congress must, therefore, be the only body competent to make any needed changes in the general rules of the maritime law." 55 Fed. 98, 105-106 (S.D.N.Y. 1893).

Thus, if an admiralty court has jurisdiction over a wharf-injury, Congress likewise would have jurisdiction

and authority to enact appropriate legislation. Several courts have expressed this obvious conclusion. E.g., *De-Bardeleben Coal Corp. v. Henderson,* 142 F.2d 481, 483 (5th Cir. 1944); *Caldaro v. Baltimore & Ohio R.R.,* 166 F. Supp. 833, 836 (E.D.N.Y., 1956). And it does not appear open to question that a court in admiralty has jurisdiction over an injury to a longshoreman on the wharf. A case in point is *Spann v. Lauritzen,* 344 F.2d 204 (3rd Cir. 1965). There a longshoreman was injured by the operation of shore-based cargo hopper. As stated by the Court:

> "The equipment was not on the vessel and neither was the longshoreman at the time of his injury. But he was engaged in the actual work of unloading the cargo from the vessel and he was using equipment which was essential for this purpose."

In this factual circumstance, the court concluded that the injury was within the "maritime jurisdiction" of the United States courts. (Of course, we are not here concerned with other matters stated in the opinion attaching the warranty of seaworthiness to shore-based equipment). Accord: *Thompson v. Calmar S.S. Corp.,* 331 F.2d 657, 659 (3rd Cir. 1964), where the court stated: "If the longshoreman is actually engaged in the service of the ship, it is immaterial whether the accident caused by the vessel's unseaworthiness occurs away from the ship on the pier."

The Second Circuit has likewise taken the position that an injury on the wharf is within the "maritime jurisdiction" of a United States court, although it held that the warranty of seaworthiness attached only if the "shore-based equipment" had become attached in some way to the vessel. Thus the court stated in *Forkin v. Furness Withy & Co.,* 323 F.2d 638, 640, 641 (2nd Cir. 1963):

> "Defendant properly concedes that liability to the plaintiff for unseaworthiness is not ruled out because the accident did not happen aboard ship * * * [And] it may well be that once the conveyor was affixed to the ship, a seaman, or a stevedore engaged in loading or unloading would have been entitled to recover on the ground of unseaworthiness."

Also, the Ninth Circuit has stated by way of dictum that the maritime jurisdiction extends to dockside accidents. *Huff v. Matson Navigation Co.*, 338 F.2d 205, 210 (9th Cir. 1964). Recently, the Fifth Circuit has followed this lead, *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422 (1966), and indeed it is probably significant to note that Nicholson's third-party case was litigated on the Admiralty Side (in District Court). *Nicholson v. SS MARY SOPHIA*, A.D. No. 63-H-83, S.D. Texas (1966).

A slight variation of this theme is that longshoremen actually working on land adjacent to a dry dock or marine railway have been held covered by the Longshore Act. *Holland v. Harrison Bros. Dry Dock and Repair Yard, Inc.*, 306 F.2d 369 (5th Cir. 1962), involved an injury to an employee working on the ground beneath a marine railway. The Fifth Circuit concluded that the injury came within the twilight zone. But relevant here is the statement of the court in Footnote 4, 306 F.2d at 373:

> "The literal language of the Longshoremen's Act seems to concern only the locality of the accident, but the history of the Act indicates that its underlying purpose was to embrace the admiralty jurisdiction whatever that might be."

It is obvious therefore that the court concluded that dry land adjacent to a marine railway was within the mari-

time jurisdiction. *A fortiori* an injury on a wharf, itself on navigable waters and adjacent to a vessel afloat in navigable waters, would fall within the maritime jurisdiction.

Maryland Casualty Co. v. Lawson, 101 F.2d 732 (5th Cir. 1939), involved an injury to a dry dock employee. In the course of its opinion, the court stated:

> "Appellants challenge this finding and allege the evidence shows the assault occurred on land adjacent to the marine railway. We consider that immaterial as the land was a part of the yard necessary to the operation of the marine railway." 101 F.2d at 733.

Travelers Ins. Co. v. McManigal, 139 F.2d 949 (4th Cir., 1944) was a case involving injury to a dry dock worker while working on the dry dock but while the dry dock was located on dry land. In upholding a federal compensation award, the court listed as the touchstone of recovery:

> "That the deceased employee was engaged in a maritime employment at a place within the admiralty jurisdiction of the federal courts." 139 F.2d at 952.

In some of the recent cases involving fact situations not dissimilar to those here, the lower courts have apparently ignored this Court's suggestion of caution in *Calbeck,* supra, "that the decisions between 1917 and 1926 produce no reliable determinant of valid state law coverage."[5] See *Houser v. O'Leary,* 253 F. Supp. 417; ____F.2d____; *O'Keefe v. Atlantic Stevedoring Co.,* 354 F.2d 48; *American Export Lines v. Revel,* 266 F.2d 82; *Johnston v. Marshall,* 128 F.2d 13, cert. den., 317 U.S. 629, 63 S.Ct.

5. 370 U.S. at p. 118, 82 S.Ct. at p. 1199.

44; *McGrath v. Hughes,* 264 F.2d 314. These courts have relied on three cases decided by this Court, two of which involve injuries predating enactment of the Act and one of which is not in point. All three, however, do involve injuries on a pier or wharf.

In *State Industrial Commission of New York v. Nordenholt,* 259 U.S. 263, 42 S.Ct. 473 (1922), the longshoreman was injured May 15, 1918, before the Act was passed by Congress. He was injured when "he slipped and fell on the dock." The court distinguished contract and tort admiralty jurisdiction saying:

> "The general doctrine that in contract matters jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled."[6]

Because "the stevedore's contract of employment did not contemplate any dominant federal rule concerning the master's liability for personal injuries received on land"[7] and the state statute did not "come into conflict with any superior maritime law,"[8] the Court allowed recovery under the state compensation act. The Court added:

> "Here no such antagonism exists. *There is no pertinent federal statute;* and application of the local law will not work material prejudice to any characteristic feature of the general maritime law."[9]

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6. 259 U.S. at p. 273, 42 S.Ct. 474.
7. Id at p. 276; Id at p. 475.
8. Id at p. 276; Id at p. 475.
9. Id at p. 276; Id at p. 475.

The second case involving an injury which preceded enactment of the Act is *T. Smith & Son, Inc. v. Taylor,* 276 U.S. 179, 48 S.Ct. 228. Although this case was decided in 1928, the injury involved occurred on March 25, 1925, hence a construction of the coverage of the federal act was not raised or discussed. To sustain the application of the state act, the Court relied on the tort admiralty doctrine that a wharf or pier is "an extension of the land."

The third case on which reliance is placed in these cases which deny coverage on the basis of the tort admiralty jurisdictional concept that a wharf or pier is an "extension of the land" is *Swanson v. Murra Bros.,* 328 U.S. 1, 66 S.Ct. 869. In this case, the longshoreman was injured on a pier as a result of being "struck by a life raft which fell from the vessel." He sought and was paid compensation under the state compensation act. The case arose when, relying on *International Stevedoring Co. v. Haverty,* 272 U.S. 50, 47 S.Ct. 19 and *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U.S. 38, 63 S.Ct. 489, he thereafter sought to recover further from his employer under the Jones Act, 46 U.S.C.A. 688.

In denying recovery, the Court among other things, said:

> "But since this Act (Longshoremen's & Harbor Workers' Compensation) is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore."[10]

10. 344 F.2d at p. 644.

One cannot quarrel with this statement. The statement has been seized upon, however, because the Court cites *Nordenholt,* supra, and *Smith & Son v. Taylor,* supra, as authority even though both involved injuries on wharves rather than injuries which in fact occurred on shore. But since a construction of the full sweep of the Act was not at issue in the case, there was not the urgency for the Court to be as precise as there would be in a case where such a construction was involved as in *Calbeck,* supra.

The fact is, as before stated, that this Honorable Court, unless it did so in *Calbeck,* supra, has not heretofore decided the precise question here involved.

In other recent cases involving fact situations similar to those here, the lower courts, in denying coverage, have adopted a reasoning which tears at the very vitals of the accepted notions of "navigable waters of the United States." See *Michigan Mutual Liability Company v. Arrien,* 344 F.2d 640, cert. den., 382 U.S. 835; and *Travelers Insurance Company v. Shea and McCollough* (Appendix B).

In *Arrien,* the Court, in supporting coverage under the Act, sought to distinguish an extension to a wharf, called a "temporary skid," from a wharf in the following language:

> "We are persuaded that the temporary skid was not part of and should not be analogized to, the wharf. A wharf or pier is usually built on pilings over what was navigable water. When the structure is completed, the water over which it is built is permanently removed from navigation, as if the structure had been in the first instance built on land."[11]

11. 344 F.2d at p. 644.

The Court of Appeals for the Fifth Circuit in the *McCollough* case and in this case adopted the "temporary" and "permanent removal from navigation" theory to deny coverage.

In this case, the owner of the wharf, Manchester Terminal & Compress Company, had applied to the U. S. Corps of Engineers pursuant to 33 USCA 403 for a permit to erect this wharf on the navigable waters of the Houston Ship Channel. The wharf had then been built pursuant to the permit issued by the Corps.

Not surprising is the fact that neither of the Courts (Second or Fifth Circuits) cited any authority for this broad and dangerous doctrine that federal jurisdiction over concededly navigable waters of the United States can somehow be ousted, "permanently" or otherwise, by federal permission to some private person or corporation to erect an approved pier or wharf in or on those concededly navigable waters. Indeed such a notion is contrary to expressions of this Court in *U. S. v. Appalachian Power Co.*, 311 U.S. 377, 61 S.Ct. 291; and *Economy Light Co. v. U. S.*, 356 U.S. 113, 41 S.Ct. 409.

In the *Appalachian Power* case, we find these statements:

> "When once found to be navigable, a waterway remains so."[12]
>
> "Nor is it necessary for navigability that the use should be continuous."[13]

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12. 311 U.S. at p. 408; 61 S.Ct. at p. 299.

13. Id at p. 409; Id at p. 300.

In *Economy Light & Power* are these observations:

> "The fact, however, that artificial obstructions exist capable of being abated, by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state."[14]
>
> "If they (navigable waters) are to be abandoned, it is for Congress, not the court, so to declare."[15]

D. THE TYPE OF VESSEL, "CANOE" OR OTHERWISE, IS NOT DETERMINATIVE OF NAVIGABILITY.

In this case, where the evidence showed that the water under the wharf, being part of the waters of the Houston Ship Channel, was deeper than the height of a man and remained freely navigable by small vessels, the Court of Appeals suggests that such is so only for vessels no "larger than a canoe." It then erroneously added that "The limited navigability of the waters under the pier is characteristic of piers generally and *as a matter of law is* not navigability within the meaning of the term 'navigable waters' ". (Appendix A; emphasis ours)

It is respectfully suggested that this Court long ago indicated that the type of size of vessels traversing the waterway was of no importance in determining the navigability of the waters.

In *U. S. v. The Monticello* (1874), 20 Wall 430, 87 U.S. 391, the Court said:

> "* * * the true test of the navigability of a stream does not depend on the mode by which commerce

14. 356 U.S. at p. 118; 41 S.Ct. at p. 411.

15. 356 U.S. at p. 124; 41 S.Ct. at p. 413.

is, or may be conducted, nor the difficulties attending navigation * * *.

It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion * * * rather than the extent and manner of that use."[16]

Again in *U.S. v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, the court pointed out that:

"* * * navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor in an absence of occasional difficulties in navigation but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."

"* * * Early visitors and settlers in that vicinity used the river and lake as a route of travel *employing the small boats of the period* for the purpose."[17]

Robinson on Admiralty (1939 Ed.) discusses this subject and suggests that waters are navigable if they will float a vessel, and that a "canoe" has been held to be sufficient. (pp. 34-40)

E. In, On, Over and Upon As Distinguishing Factors.

In *McCollough* (Appendix B), the court below took occasion to make a distinction between "over" and "upon"

16. 20 Wall at p. 441, 87 U.S. at p. 394.

17. 270 U.S. at pp. 56 and 57, 46 S.Ct. at p. 199.

navigable waters, indicating that if Congress had intended to include "over" as well as "upon" it would have said so, and did not.

First of all, by the same token, one could argue that if Congress had intended to include dry land around "any drydock" it would have said so. See *Continental Casualty v. Lawson,* 64 F.2d 802; *Avondale Marine Ways v. Henderson,* 201 F.2d 437, 346 U.S. 366, 74 S.Ct. 100; *Holland v. Harrison Bros.,* 306 F.2d 369; *Maryland Casualty v. Lawson,* 101 F.2d 732.

It is unthinkable that an Act, which must be "liberally" construed in conformity with its purpose and in a way which avoids harsh and incongruous results,"[18] should be construed so hypertechnically. See *D'Aleman v. Pan American World Airways,* 259 F.2d 493; *Notarian v. Trans World Airlines,* 244 F. Supp. 874; *Dixon v. Oosting,* 258 F. Supp. 25; *U. S. v. Yee Nee How,* 105 F. Supp. 517.

F. ADMIRALTY EXTENSION ACT.

What has been said above does not depend upon the Admiralty Extension Act, 46 U.S.C.A., Sec. 740 (1948), which provides:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land."

At the outset, it must be decided whether the Extension Act has impact on the Longshore Act. The Sixth Circuit

18. Reed v. Yaka, 373 U.S. 410, 415, 83 S.Ct. 1349, 1353.

in *Interlake S.S. Co. v. Nielsen*, 338 F.2d 879, 882 (6th Cir. 1965) stated:

> "While the Admiralty Extension Act of 1948 obviously was not designed directly to affect the Longshoremen's and Harbor Workers' Compensation Act, it did serve to make clear that admiralty jurisdiction could extend to damage caused on land by marine events, although early case law held to the contrary."

And the court concluded:

> "It seems obvious to us that the trend of case law, the impact of the Admiralty Extension Act, and the effect of *Calbeck* have all pointed in the direction of expanding the boundaries of admiralty jurisdiction toward land. It does not require any great clairvoyant to hold that at present admiralty jurisdiction clearly encompasses the navigable waters immediately adjacent to a dock.
>
> "If *Calbeck* holds (and we think it does) 'that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority' then there can be no doubt about the outcome of this appeal." 338 F.2d at 882-883.

In Footnote 4, the court recited:

> "In this regard, we have considered and rejected language relied upon by appellee from Atlantic Stevedoring Co. v. O'Keeffe, 220 F. Supp. 881 (S.D. Ga. 1963), finding this District Court opinion neither binding nor persuasive."

The matter was stated more emphatically by Judge Winter in *Boston Metal Co. v. O'Hearne*, U.S.D.C., District of Maryland, Admiralty No. 4412, June 21, 1963 (oral opinion), affirmed 329 F.2d 504 (4th Cir. 1964):

> "I take some comfort also in the Admiralty Extension Act, Mr. Whiteford, because, true, the Admiralty Extension Act was not passed until after the Longshoremen's and Harbor Workers' Compensation Act was passed, but I think that the *Calbeck* case makes perfectly plain that the application of the Longshoremen's and Harbor Workers' Act was not to be frozen to the Admiralty Jurisdiction of the United States as it existed in 1927 or as it was considered then to exist, but that rather there may be read into the Longshoremen's and Harbor Workers' Act a more flexible concept that under subsequent legislation or as a result of subsequent court decisions, the admiralty jurisdiction of the United States is being expanded and the application of the Longshoremen's and Harbor Workers' Act expands along with it."

Moreover, there is a host of cases holding injuries on a wharf to be within the maritime jurisdiction where either an appurtenance of a vessel or its gear or its cargo was a causative factor. The leading case is *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963). There a longshoreman was injured on the wharf when he slipped on beans that had spilled out of bags unloaded from the vessel, and the court had no difficulty in finding the incident within the maritime jurisdiction. Mr. Justice White for the court observed:

> "Respondent contends that it is not liable at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C., Sec. 740, swept it away. * * *"

E.G., *Hagan v. Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3rd Cir. 1963) (injury 100' from the vessel); *Thompson v. Calmar S.S. Corp.*, 216 F. Supp. 234 (E.D. Pa. 1963) (injury on wharf); *Fitzmaurice v. Calmar S.S. Corp.*, 198 F. Supp. 304 (E.D. Pa. 1961) (injury on wharf).

In the instant case, it is undisputed that the claimant was injured by an appurtenance of the vessel (its hatch beams) while the vessel was being moved along the wharf to a new position. Therefore, he was in fact injured by a piece of ship's gear, making the Admiralty Extension Act directly applicable. Thus, the injury was within the maritime jurisdiction and the perview of the Longshore Act.

CONCLUSION

For all the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

MANDELL & WRIGHT

By _____
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228-1521

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing petition were mailed to Mr. Ed Bluestein, Jr., Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas 77002, Attorneys for Crown Stevedoring Company and Texas Employers' Insurance Association; to Mr. John C. Eldridge and Mr. Leavenworth Colby, Department of Justice, Washington, D.C., and Mr. Jack Shepherd, Assistant United States Attorney, Federal Office Building, Houston, Texas 77002, Attorneys for C. D. Calbeck, on the 27 day of November, 1967, by depositing same in the United States mails, properly stamped and addressed.

Herman Wright

Herman Wright

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 24,342

ANDREW NICHOLSON, Appellant,

versus

C. D. CALBECK, Deputy Commissioner, ET AL,
Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(October 31, 1967.)

Before WISDOM and GOLDBERG, Circuit Judges, and SEALS, District Judge.

PER CURIAM: This appeal is from a judgment dismissing the complaint brought by an injured employee, the appellant, under 33 U.S.C. § 921(b) and 5 U.S.C. 700, to review and set aside the determination of the

Deputy Commissioner that the claimant was not entitled to benefits under the Longshoreman's and Harbor Workers' Act, 33 U.S.C. § 903(a).

On May 26, 1960, Andrew Nicholson, claimant-appellant, was injured while performing service as a longshoreman for his employer. He performed his work upon a pier erected on pilings and concrete blocks resting on the bed of navigable waters of the United States. The inshore edge of the pier is attached to the outboard edge of the employer's warehouse, a portion of which is also over water so that the inshore edge of the pier is not attached to or supported by land. In preparing to load the SS "Mary Sophia", some "tween deck beams" were placed on the pier. During the loading it became necessary to move the vessel. Rather than place the beams back on the vessel, forklifts were used to move the beams to the vessel's new position. As Nicholson was assisting in this moving, the beams slid from their resting place on the forklifts, striking him on the back of his legs. The Commissioner and the district court held that the accident did not come within the provisions of the Longshoremen's Act because the claimant was not injured "upon the navigable waters of the United States".

The disposition of this case is controlled by the recent decision of this Court in *Travellers Insurance Company v. Shea, Deputy Commissioner, and McCollough,* No. 23492, decided August 9, 1967. In *McCollough* this Court held that the waters under a floating pier permanently attached to the shore were no longer "navigable waters". The Court distinguished between waters under a pier and waters under a vessel. See *Michigan Mutual Liability Co. v. Arrien,* 2 Cir. , 344 F.2d 640.

In the present case, the Deputy Commissioner found as a fact that the waters underneath the pier continued to be freely navigable by small crafts. Photographs demonstrate that no small craft larger than a canoe could navigate under the pier. The limited navigability of the waters under the pier is characteristic of piers generally and as a matter of law is not navigability within the meaning of the term "navigable waters".

The judgment is AFFIRMED.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

THE TRAVELERS INSURANCE COMPANY and LEVINGSTON SHIPBUILDING COMPANY,
Appellants,

versus

R. J. SHEA, Deputy Commissioner, and JAMES D. McCOLLOUGH,
Appellees.

Appeal from the United States District Court for the Eastern District of Texas.

(August 9, 1967.)

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge: This is a suit to enjoin the enforcement of an award made under the Longshoremen's and Harbor Workers' Compensation Act, 33 USCA §§901-950. The facts are simple and undisputed.

James D. McCollough, an employee of Levingston Shipbuilding Company, was injured while assisting in repairing a barge when feeding a sandblasting machine. At the time of injury, he was working on a floating outfitting pier, which consisted of floating steel barges tied end to end, approximately 750 feet long and connected to land by a 90 foot ramp, which had been permanently anchored to the shore and bottom of the navigable Sabine River by clusters of piling for eighteen years. Claimant McCollough was paid compensation at the scale provided by Texas law but brought his claim for the additional amount due under the federal Act. The Deputy Commissioner, finding that the injury occurred while claimant was "upon the navigable waters of the United States (including any dry dock)" within the meaning of the Act,[1] entered an award under the Longshoremen's Act and allowed full credit for payments made under the Texas act as provided by 33 USCA §914(k). Levingston and its insurer filed this suit seeking a mandatory injunction to set aside the award of the Deputy Commissioner as authorized by 33 USCA § 921(b) and 5 USCA § 1009(e) and from a dismissal of their complaint have filed this appeal.

We have for resolution the singular question of whether McCollough's injury, which occurred on the floating outfitting pier described above, was an injury "occurring upon the navigable waters of the United States (including any dry dock)" and as such properly comes within

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[1] Coverage under §903 is provided for in pertinent part as follows:
"(a) Compensation shall be payable under this chapter . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States (Including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

the jurisdiction of the Longshoremen's Act. Our duty is logged and compassed. In the absence of substantial evidence to the contrary, we must presume that the claim is covered by the Act. 33 USCA § 920, *O'Leary v. Puget Sound Bridge and Dry Dock Co.*, 9 Cir. 1965, 349 F.2d 571; *Marine Stevedoring Corporation v. Oosting*, E.D. Va. 1965, 238 F. Supp. 78. Concluding as we do, however, that there is no evidence to support the conclusion that McCollough was injured upon the navigable waters of the Sabine, we reverse the case.

The ratio decidendi in those cases interpreting §903(a) is a beacon to us here. The coverage of the Act is not keyed to function but has uniformly been situs-oriented. As our Court held in *O'Keefe v. Atlantic Stevedoring Company*, 5 Cir. 1965, 354 F.2d 48, 50:

> "The difficult problem is the determination as to the place where the injury occurred. It is the place where the injury occurred that determines whether there is Longshoremen's Compensation coverage."

The Act does not cover all harbor workers, or all those working on ships, or those performing services to ships. These words would be the actuating words if functionalism were to prevail over locus. Congress set out to cover workers not protected by state workmen's compensation laws, but there is a void, a so-called twilight zone, between navigable and non-navigable waters. Since there exists hybrid employment with labors terrestrial and maritime and since state coverage does not preclude federal coverage, *Colbeck v. Travelers Insurance Co.*, 1962, 370 U.S. 114, 8 L.ed.2d 368, 82 S.Ct. 1196, we do have the paradox of two workers doing the same type of work

a few feet apart receiving injuries in the same way, yet treated as legal strangers. The paradox is not judicially soluble unless we extirpate the words "upon . . . navigable waters . . . (including any dry dock)" from the statutory commandment, which we are forbidden to do. Instead, we embark on an analysis of the cases construing them. The pattern of decision which emerges is not crystalline or pellucid, but the cases do lend themselves to rude categorization:

(a) Injuries occurring on piers, wharves, or other extensions of land

Structures such as wharves, piers, and docks affixed permanently to shore traditionally have been held to be extensions of land and any remedies for injuries occurring on such structures have been held to be restricted to those afforded by local law—this despite the fact that the injured employee was employed by one who was subject to the Longshoremen's Act and was injured while loading, unloading, or otherwise concerned with the vessel. *O'Keefe v. Atlantic Stevedoring Company,* 5 Cir. 1965, 354 F.2d 48; *American Export Lines, Inc. v. Revel,* 4 Cir. 1959, 266 F.2d 82; *Nicholson v. Colbeck,* S.D. Tex. 1966, 266 F. Supp. 103; *East v. Oosting,* E.D. Va. 1965, 245 F. Supp. 51; *Johnson v. Traynor,* D. Myld. 1965, 243 F. Supp. 184.

In the *Revel* case, *supra,* Revel, a stevedore, was injured when a load of drums fell onto the pier on which he was working. In denying recovery under the Act, the Fourth Circuit stated clearly that "since Revel was injured while standing on the dock (an extension of land), his remedies are restricted to those afforded by local law." 256 F.2d at 84.

The fact that water ebbs and flows under piers or wharves has been held insufficient to make injuries occurring on them compensable under the Act. *East v. Oosting, supra; Nicholson v. Colbeck, supra.* The controlling question seems to be whether the water beneath the structure has been permanently removed from navigation. As the Court said in *Michigan Mutual Liability Co. v. Arrien,* 2 Cir. 1965, 344 F.2d 640, 644:

> "A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it was built is *permanently* removed from navigation as if the structure had been in the first instance built on land."

Thus, in the *Arrien* case, the stevedore injured when knocked from the skid on which he was working was held to be covered by the Act, since the skid in question was a removable platform extending out over the water, was easily dismantled, and was stored on the wharf when not in use. The Court reasoned that the skid was similar to a gangplank as opposed to a permanent structure such as a pier or wharf and that the waters under it were as navigable as they would be if a ship were moored in the same place.

In yet another case, *Johnson v. Traynor, supra,* companion proceedings were brought by two longshoremen injured while loading a vessel afloat on navigable waters from a gondola-type railroad car positioned on railroad tracks at the high pier of the Bethlehem Steel plant. The injuries were caused when a steel beam, being hoisted from the railroad car by a crane located on the vessel,

swung back, striking one of the men, propelling him onto the pier, fatally injuring him, and pinning the other to the gondola car. Despite the fact that the pier's 600-foot surface extended over navigable waters, the court denied recovery under the Act. We agree with these interpretations. If injuries occurring "over" as well as "upon" navigable waters were congressionally intended to be covered by the Longshoremen's Act, the statute could and would have so read. It does not.

(b) Drydocks

Injuries occurring on dry docks, which are located on navigable waters and used to raise the ship out of water to permit examination or repairs to its hull impossible while the ship is afloat, are within Longshoremen's Act coverage by express statutory inclusion. E.g., *Avondale Marine Ways; Inc. v. Henderson,* 1953, 346 U.S. 366, 98 L.Ed. 77, 74 S.Ct. 100. In his concurring opinion to the Court's per curiam opinion in *Avondale,* which held that a marine railway is a dry dock within the statute, Mr. Justice Douglas comprehensively defined a dry dock as follows:

> "[T]here are three kinds of dry docks. (1) a floating dry dock, as its name makes clear, floats on the water, the vessel resting on the bottom of the dry dock after the water has been removed. (2) A graven dry dock is dug into the land. The vessel floats in but rests on land once the water has been pumped out. (3) Finally there is the marine railway, on which the vessel is drawn out of the water, instead of the water being drawn away from the vessel. A ship is no

> more and no less on land when it rests in a graven dry dock than when its rests on a marine railway. The three types of dry docks are not different in kind: functionally they are the same. And I see no basis for concluding that Congress treated one differently from the others for the purposes of this Act." 346 U.S. at 367, 98 L.Ed. at 79, 74 S.Ct. at . . .

See also *O'Leary v. Puget Sound Bridge and Dry Dock Co.*, 9 Cir. 1965, 349 F.2d 571, 572-73.

Land alongside and under a marine railway has also been held to be an integral part of the marine railway and hence a dry dock. *Holland v. Harrison Brothers Dry Dock and Repair Yard, Inc.*, 5 Cir. 1962, 306 F.2d 369. Confronted with a shipyard workman who was injured while lifting hose to work on a barge drawn up on a marine railway, Judge Wisdom, speaking for the Court, said:

> "It seems reasonable to us that any meaningful definition of marine railway should include the land immediately adjacent to the track *that is beneath a ship drawn up on the railway and that must be used in the course of repairing any ship on the railway.*" 306 F.2d at 372.

In the recent case of *O'Leary v. Puget Sound Bridge and Dry Dock Co., supra,* the Ninth Circuit faced the dry dock inclusion in the Longshoremen's Act and indicated its unwillingness to further enlarge longshore coverage. That case involved an injury sustained on dry land by an employee engaged in new ship construction from a

building way. The building way, located on land, had its seaward end extending into the water on an incline, around which water flowed. In holding that the building way did not constitute "any dry dock" within the Act, despite the portion which extended into the water, the Court affirmatively imposed a limit to the outer boundaries of the Longshoremen's Act.

(c) Injuries occurring in or upon navigable waters: Cases with exceptional fact situations

Finally, there are those exceptional cases which base their holdings allowing recovery upon unique factual situations. Most representative is *Interlake Steamship Company v. Nielson,* 6 Cir. 1964, 338 F.2d 879, cert. den. 381 U.S. 934, where the Court permitted recovery under the Act for a fatal injury occurring when a shipkeeper drove his automobile off a dock and fractured his skull on the frozen navigable waters of Lake Erie. The Court reasoned that despite the fact that the impetus which propelled claimant onto the ice had a land-based origin, the situs of the injury and death was clearly the frozen navigable water of Lake Erie, undisputedly within the scope of admiralty jurisdiction. Similarly, recovery has been allowed where a longshoreman was lifted from the dock, dropped into navigable water between the ship and the wharf, and drowned, *O'Keefe, supra,* and where drowning resulted from a fall off the pier, *Marine Stevedoring Corp., supra.* These cases support the thesis that the Longshoremen's Act should be applicable in these and similar factual situations, for, as said in 2 Am. Jur. (2d), Admiralty, §85:

> "If a person or property is precipitated from land into the sea as the result of a wrongful

> act or omission, and there is no impact on the person or property before he or it strikes the water, the tort, for jurisdictional purposes, is considered to have occurred on the water. . . ."

Applying existing case law to the outfitting pier in question, the conclusion is inescapable that this was a territorial tort rather than a maritime misfeasance within the construct of the Longshoremen's Act. The law in this area has been geographized as the "twilight zone", and though our only illumination is by twilight, our direction is clear. This pier does not dwell in a penumbra, for the plethora of cases safely navigates us, by buoys and soundings, to land; that is, to the law governing injuries occurring on piers, wharves, or similar structures. We have no unique or exceptional factual situation before us.

The court below found that McCollough was injured when "working on a floating outfitting pier supported by barges. The pier was some 900 feet long and was permanently anchored to the shore and bottom of the Sabine River by piling clusters." It had, moreover, been so anchored for eighteen years. This outfitting pier, in sum, was a structure permanently affixed as an extension of land. It was not akin to the skid in *Arrien, supra,* for it was the very antithesis of a transient or transitory structure. Its permanent home was in the water, and the waters below it had been completely removed from navigation. As such, it must be considered a pier or wharf, and injuries occurring upon it, like the one suffered by McCollough, are compensable only by local law and are not covered by the Longshoremen's Act. *O'Keefe, supra; Revel, supra; Nicholson, supra; East, supra; Johnson, supra.* No conclusion contra is indicated by the *Interlake*

Steamship Co. line of cases, discussed *supra*, since these cases are readily distinguishable on their facts from the one at bar.

Appellees would have us liken this floating outfitting pier to a dry dock or to the land alongside a marine railway, since the pier can be used to repair a ship. Thus, they urge that we uphold the Deputy Commissioner's award. We have not, however, dealing with a dry dock or marine railway. A dry dock functionally as well as nautically is different from a floating barge. A dry dock lifts or shifts the ship. If it is to be a marine railway, it is hoisted upon land. If it is to be a dry dock, it submerges or fills with water. This floating barge does neither, and it must be remembered that the coverage of the Longshoremen's Act is not keyed to function but is situs-oriented. We are not impressed by the fact that McCollough was injured when assisting in repairing a vessel. We are, however, very impressed by the undisputed evidence, which shows that the situs of the injury to McCollough was a permanently anchored structure which, once built, was an extension of the shore of the Sabine River.

The Deputy Commissioner and appellee McCollough would, by some absorptive process, engraft the provisions of the Admiralty Extension Act of 1948, 46 USCA §740,[2] onto the Longshoremen's Act. This may have some logical magnetism, but it defies the precursive and the

---

[2] 46 USCA §740 provides in pertinent part:
"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

posterior history of both Acts. In *Johnson v. Traynor, supra,* a similar claim was made that the Admiralty Extension Act in effect amended the coverage provision of the Longshoremen's Act and extended coverage under the latter act to certain types of land injuries. In an extensive, scholarly opinion, Judge Watkins dismissed this contention, saying that Congress, although it had been urged to, did not intend to so extend coverage.

> "Certainly the Extension Act does not strike down the distinction previously made by the courts between land injuries and water injuries. Indeed the act expressly recognizes the existence of land injuries as distinguished from injuries occurring on navigable water. . . .
>
> "Secondly, the Extension Act is certainly not an express amendment of the Longshoremen's Act. It is completely silent as to the Longshoremen's Act. Similarly a contemporaneous amendment of the Longshoremen's Act contains no cross reference to the Extension Act. . . .
>
> "Thus, there is no indication in any of the legislative history pertaining to the Longshoremen's Act either before, at the time of, or after the passage of the Extension Act that the Extension Act was intended in any way to affect the scope of coverage of the Longshoremen's Act."
>
> 243 F.Supp. at 190-92.

If the Admiralty Extension Act were to measure the jurisdictional perimeter of the Longshoremen's Act, this could have and would have received express Congressional

articulation. The reports, debates, colloquies, and other prologues to legislative gestation, as well as the recent judicial decisions, do not indicate any such doctrine of co-extensiveness. *Interlake Steamship Co., supra; East, supra.*

Reversed and remanded for proceedings consistent with this opinion.

DEC 14 1967

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 877

ANDREW NICHOLSON,

Petitioner,

v.

C. D. CALBECK, Deputy Commissioner, et al,

Respondents.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, *AMICUS CURIAE* PETITION AND BRIEF IN FAVOR OF PETITIONER

American Trial Lawyers Association
Admiralty Section

By: Paul S. Edelman

PAUL S. EDELMAN,
99 Park Avenue,
New York, New York.

On Petition and Brief.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE AMERICAN TRIAL LAWYERS ASSOCIATION FOR LEAVE TO INTERVENE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Trial Lawyers Association moves this Honorable Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari in this case.

Consent has been sought from the parties herein. Consent to file an *amicus curiae* brief has been given by the attorneys for Mr. Nicholson and by the Honorable Erwin N. Griswold, Solicitor General on behalf of the United States Department of Justice representing C. D. Calbeck,

Deputy Commissioner. Counsel for respondents has refused consent. Accordingly, this motion is brought pursuant to Rule 42.

Members of the Admiralty Section of the Association include attorneys who represent the major number of injured longshoremen, maritime workers and crew members. In particular, these attorneys are directly concerned with the scope and effect of the Longshoremen's and Harbor Workers' Compensation Act in their day-to-day practice in relation to their injured clients.

Since this case represents but one of many situations where state benefits are but half the federal compensation benefits, and a basic question of statutory jurisdiction has been put in question, never determined explicitly by this Court, the Association feels constrained to petition this Court for leave to intervene as *amicus curiae*.

Respectfully submitted,

.....

PAUL S. EDELMAN
Counsel for The American
Trial Lawyers Association

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

ANDREW NICHOLSON,

Petitioner,

v.

C. D. CALBECK, Deputy Commissioner, et al,

Respondents.

AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF PETITIONER

American Trial Lawyers Association
Admiralty Section

Statement of Interest of the *Amicus Curiae*

Paul S. Edelman, of Kreindler & Kreindler, New York, New York, a member of the bar in this Court, on behalf of the American Trial Lawyers Association, respectfully petitions this Court for leave to file a brief *Amicus Curiae* on behalf of petitioner herein, and if granted, for this Honorable Court to consider the arguments and cases in point following this Statement of Interest.

Consent to the filing of this brief has been given by the attorneys for the Petitioner and also by Hon. Erwin N. Griswold, Solicitor General, on behalf of the United States

Department of Justice, representing C. D. Calbeck, Deputy Commissioner. Attorneys for the respondents have not consented.

The American Trial Lawyers Association, is a national bar association, consisting of more than 20,000 lawyers, primarily engaged in the practice of personal injury law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors who specialize in maritime personal injury law. These attorneys represent members of the merchant marine and other maritime workers who are engaged in a hazardous industry and are recognized as having a special status both by legislation and generally in the courts of the land. All of these maritime workers have a real and direct interest in the outcome of this appeal.

Said Association is vitally concerned in the final outcome of this case involving as it does a situation which may finally resolve the tortuous series of cases which have attempted for over a generation to make a clear line by which attorneys and injured maritime workers will know their rights. It is a question of serious importance since 25% of all longshoremen's injuries occur on docks and piers, and in most states the average compensation is but half the federal rate.

A resolution of the issues in this case will materially affect not only the financial plight of injured maritime workers, but is of paramount importance to hundreds of thousands of workers, to the admiralty bar, and to the maritime industry generally. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief *Amicus Curiae*.

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IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN TRIAL LAWYERS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

On behalf of Andrew Nicholson, the American Trial Lawyers Association prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered October 31, 1967.

Questions Presented

A longshoreman suffered an amputation by ship's equipment while the equipment was being moved on a dock. The dock was "upon, over or above navigable waters." Did

the Deputy Commissioner have jurisdiction to make an award for the injury pursuant to the Federal Longshoremen's Compensation Act?

Statement

Petitioner's leg was amputated while assisting in moving certain hatch beams of a vessel on a pier during the shifting of a vessel from one part of a pier to another. Petitioner was one of a longshoremen's gang preparing to load the vessel. For the sake of convenience, the hatch beams were removed from the vessel, and rather than being returned to the vessel were carried by a forklift to the ship's new location down the pier. The pier was on pilings and on concrete blocks over and above navigable waters. When the beams slid from the forklift they injured the petitioner.

The Deputy Commissioner and the courts below have rejected the claim of the petitioner because it occurred on a pier or dock even though the injury was caused by ship's equipment and the dock was over navigable water.

This Court is being called upon to settle the issue as to whether the Longshoremen's Act is applicable to accidents within Congressional power over admiralty and maritime accidents. In addition, this Court is being asked to decide whether the Longshoremen's Act and Congressional power is co-extensive with maritime contracts and interstate commerce powers thereby including an injury to a longshoreman by ship's equipment on a dock erected over navigable water.

It has been statistically demonstrated that about 25% of all injuries to maritime employees occur on docks and piers while ships are being loaded, unloaded, or repaired. Awards under the Federal Act are typically twice the amount given under most state acts.

The effect of the decision below is to withdraw a significant number of maritime accidents from the reach of federal concern.

I. The Longshoremen's Act Extends To The Limit Of The Admiralty Jurisdiction And Congressonal Power.

A review of the Supreme Court decisions since *Southern Pacific Co.* v. *Jensen* (1917), 244 U. S. 205 leads to the analysis that the Longshoremen's Act fulfills the Federal concern to the limit of Congressional power.

Jensen limited a state's power to the water's edge; a state compensation act was held inapplicable to an injury and death on a gangplank. However, *Jensen* (at p. 217) makes it clear that the Federal jurisdiction does not begin at the water's edge. The decision states without equivocation that there is Federal concern for any stevedoring activity; it involves a maritime contract of employment; by its very nature it is a maritime engagement; it affects "navigation between the states and with foreign countries . . .".

Thereafter commenced the series of cases to limit the rigidity of *Jensen* by establishing a rule of "local" concern to allow a state compensation act to apply to certain maritime injuries. But these cases were not limitations on Federal power which at the time was not exercised.

It was in this context that the Longshoremen's Act was debated and passed by Congress. Thereafter, the jurisdiction of admiralty was clarified by passage of the Extension in Admiralty Act; not to create new causes of action but to make American admiralty practice clearly in accord with the law of England and other foreign countries.

More recently, this Court has acknowledged in *Calbeck* v. *Travelers Insurance Co.* (1962), 370 U. S. 114 that in pass-

ing the Longshoremen's Act, "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter", and that ". . . Congress intended the compensation act to have a coverage coextensive with the limits of its authority".

Calbeck dealt with the application of the Federal Act to a welder engaged in "new" ship construction, as opposed to the suggested exclusive remedy of state compensation. The Court cited extensively language from *DeBardeleben Coal Corp.* v. *Henderson* (5th Cir. 1944), 142 F. 2d 481, at page 130 of 370 U. S.

The wide application of the rule that the Longshoremen's Act is co-extensive with federal maritime jurisdiction is underlined by *Boston Metals Co.* v. *O'Hearne,* D. C. Md. Adm. #4412, unreported opinion, June 20, 1963, aff'd (4th Cir. 1964) 329 F. 2d 504, cert. den. 379 U. S. 824. In that case a widow of a welder who was killed on a decommissioned hulk was held entitled to collect under the Act. The hulk was fast aground and in the process of being scrapped. District Judge Winter in the unreported opinion to this case stated:

> "I think the *Calbeck* case equates, I think the legislative history (of the Longshoremen's Act) supports, and I think the decisions in this Circuit also support the concept that *navigable waters* of the United States *means the admiralty jurisdiction of the United States, wherever it may be from time to time.*
>
> * * * I think that the *Calbeck* case makes perfectly plain that the application of the Longshoremen's and Harbor Workers' *Act was not* to be *frozen* to the *admiralty jurisdiction* of the United States as it then existed *in 1927* or as it was *considered then* to *exist,* but that rather there may be read into the Longshoremen's and Harbor Workers' Act a more flexible concept that under *subsequent legislation or,* as a result

of *subsequent court decisions,* the admiralty jurisdiction of the United States is being expanded and the application of the *Longshoremen's* and Harbor Workers' *Act expands along with it.*"

In *Holland* v. *Harrison Bros. Drydocks, etc.* (5th Cir. 1962), 306 F. 2d 369, 373, footnote 4 states that not only the locality is important but also "the nature of the work".

The footnote further states:

> "* * * The literal language of the Longshoremen's Act seems to concern only the locality of the accident, but the history of the Act indicates that its *underlying purpose* was to *embrace the admiralty jurisdiction whatever that might be.*" (Emphasis added.)

Once accepting this clear proposition, it is only necessary to establish how far "ashore" the admiralty jurisdiction extends.

By statute, the Admiralty Extension Act, 46 U.S.C., Sec. 740 (1948), provides:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land."

The meaning of "caused by a vessel on navigable waters" has authoritatively been held to mean that even a dockside injury is covered by maritime law where the injury arose out of some "service to the ship".

The Supreme Court so held in *Gutierrez* v. *Waterman Steamship Co.,* 373 U. S. 206 (1963), and rejected the contention that the injury must be caused by the vessel or ship's appurtenances. In *Gutierrez,* a longshoreman was injured on a wharf when he slipped on beans that had spilled out of bags being unloaded from the vessel, and

the Court held that this dockside accident was within the maritime jurisdiction and subject to the doctrine of unseaworthiness.

Justice White, speaking for the Court made it clear that the impact on dockside was within the ambit of maritime jurisdiction because of the Extension of Admiralty Jurisdiction Act, and stated:

> "Respondent contends that it is not liable at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C., Sec. 740, swept it away. * * *"

From *DeBardeleben* to *Calbeck* to *Gutierrez*, it is demonstrated that the Longshoremen's Act is co-extensive with admiralty jurisdiction, and that admiralty jurisdiction extends even to dockside where a worker is injured because of an activity related to a vessel and particularly when caused by direct contact with a vessel or its appurtenances.

This Court has never expressly held that a pier injury is cognizable under the Longshoremen's Act. The closest case—and one of the most brilliant decisions in the field—is *Michigan Mutual Liab. Co.* v. *Arrien*, 233 F. Supp. 496 (S.D.N.Y., 1964), aff'd (2d Cir. 1965) 344 F. 2d 640, cert. den. 382 U. S. 835. The facts of this case are of paramount importance because, in some quarters, they have been misconstrued.

> "At the time of the accident, he was working on a 'skid'—a removable platform approximately six by ten feet—which was attached to the dock. It extended out over the water and towards the ship some twenty to twenty-five feet below the deck, its outer edge short of the side of the vessel. The skid was

necessary because the stringpiece of the dock was too narrow. . . .

"The skid was attached to the pier by two overhead cables, extending from the superstructure of the pier to its offshore corners. The onshore side of the skid was secured to the stringpiece of the dock by three angle irons affixed to the stringpiece." (497)

The skid extended the working surface of the pier. In no sense was it a gangway or gangplank. It did not enable passengers, longshoremen or other workmen to go back and forth between the pier and the ship. It was exclusively an extension of the pier, and not of the ship.

The jurist epitomized the basis for his upholding an award under the Act in favor of a longshoreman injured while working on the skid in this one pregnant sentence:

"It thus appears that 'upon the navigable waters' is to be equated with 'admiralty jurisdiction.' " (501)

In commenting on the Admiralty Extension Act, he observed, 502:

"The basis upon which the Extension Act and the Longshoremen's Act rest is the same—the admiralty jurisdiction of the United States; and both Acts must be understood to have expanded pari passu with it. Any departure from this view would compel the conclusion that the Longshoremen's Act was to be frozen to the admiralty jurisdiction of the United States as it was understood at the time of its enactment in 1927, a view rejected by the Supreme Court in the *Calbeck* case by clear implication."

Another case underscoring the expansive influence of the Admiralty Extension Act upon not only traditional Admiralty concepts but also on the Longshoremen's and Harbor Workers' Act is *Interlake Steamship* v. *Nielsen*,

338 F. 2d 879 (6th Cir., 1965), cert. den. 381 U. S. 934. A shipkeeper drove his car off the end of the dock where his vessel was berthed and died of a fractured skull sustained on impact with the frozen waters of Lake Erie. The widow was granted an award by the Deputy Commissioner but had it taken away by the District Court. The Court of Appeals reversed and reinstated the benefits.

Judge Edwards wrote:

> "While the Admiralty Extension Act of 1948 obviously was not designed directly to affect the Longshoremen's and Harbor Workers' Compensation Act, it did serve to make clear that admiralty jurisdiction could extend to damage caused on land by maritime events, although early case law had held to the contrary. (See *Cleveland Terminal & Valley R.R. Co.* v. *Cleveland Steamship Co.*, 208 U. S. 316 (1908); *State Industrial Commission of New York* v. *Nordenholt Corp.*, 259 U. S. 263 (1922))" (882), and also:
>
> "It seems obvious to us that the trend of case law, the impact of the Admiralty Extension Act, and the effect of *Calbeck* have all pointed in the direction of expanding the boundaries of admiralty jurisdiction toward land." (882)

Very soon after its enactment, the Admiralty Extension Act was considered to be a clarification of jurisdiction which had always existed, although not always exercised.

Strika v. *Netherlands Ministry*, 185 F. 2d 555, 558 (2d Cir., 1950), cert. den. 341 U. S. 904.

The Act was even applied retroactively. *U. S.* v. *Matson Nav. Co.*, 201 F. 2d 610, 614 (9th Cir., 1953) (property damage to a federally owned dike).

The reasoning above has allowed recovery for seamen ashore when injured in the service of the ship under the Jones Act.

In *O'Connell* v. *Great Lakes Dredge and Dock Co.* (1943), 318 U. S. 36, a seaman was injured on land during the repair on a gasket connection to a land pipe used in discharging a ship's cargo.

A handyman who assisted in navigation of a dredge was injured in a shed on shore due to an explosion in a coal stove while he was placing lamps from the dredge in the shed. Recovery was sanctioned under the Jones Act in *Senko* v. *LaCrosse Dredging Corp.* (1927), 352 U. S. 370.

The most far-reaching case is, of course, *Hopson* v. *Texaco, Inc.* (1966), 15 L. Ed. 2d 740. In that case two ill seamen in a foreign port were being taken to the United States consul in a taxi cab procured by the ship's master. The cab driver was in a collision, through his negligence. One seaman was killed and one was injured. The taxi service was held to be an "agent" of the shipowner, and recoveries were allowed against the shipowner under the Jones Act.

The same grant of power to Congress by the Constitution delimits the reach of the Jones Act and the Longshoremen's Act. Where an injury occurs because of a vessel-connected activity the scope of both these federal statutes extends and grants a remedy.

Since the Supreme Court has seen fit to allow damage actions under maritime law for dock injuries, there is no impediment for the application of the Longshoremen's Act to the same injuries.

The so-called dry-dock cases reenforce the admiralty jurisdiction over land areas involving maritime pursuits; the federal Act has been applied universally.

Maritime workers injured on a "drydock" are specifically covered by the Longshoremen's Act as well as those who work at least in part upon navigable waters.

33 U.S.C., Sec. 902(4); 903(a).

A "drydock" included a marine railway whereby a vessel is drawn from the water onto land.

Avondale Marine Ways, Inc. v. *Henderson* (1953), 346 U. S. 366.

To make this meaningful, the land adjacent to a marine railway is within the geographical and functional scope of the Longshoremen's Act. This has been the consistent view of the Court of Appeals.

Holland v. *Harrison Bros. Drydock etc.* (5th Cir. 1962), 306 F. 2d 369, 372, and *Maryland Casualty Co.* v. *Lawson* (5th Cir. 1939), 101 F. 2d 732, 733, cited with approval in the *Avondale Marine Ways* case.

A "building way" injury has also been held covered by the Longshoremen's Act. A building way is on land and used for new ship construction, but the outermost end extends into the water for the launching of a completed vessel. The "building way" was held to be sufficiently within the term "dry dock" to allow recovery for a workman under the Longshoremen's Act in *Port Houston Ironworks Inc.* v. *Calbeck* (S. D. Tex., 1964), 227 F. Supp. 966.

A dock or pier is demonstrably within the admiralty jurisdiction when a maritime worker is injured by ship's equipment. This is a reasonable and common-sense approach.

> "A wharf is a structure on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded. Hence waters of sufficient depth to float vessels is an essential part of every wharf. *A wharf cannot be defined or conceived except in connection with adjacent navigable waters.*" (Emphasis supplied.)
>
> *Langdon* v. *City of New York* (1883), 93 N. Y. 129, 151.

Compensation acts in general, and the Longshoremen's Act in particular are to be liberally construed in favor of coverage.

Many decisions involving the Longshoremen's Act discuss this principle of statutory construction. *Reed* v. *The Yaka* (1963), 373 U. S. 410, restates this proposition:

> "We have previously said that the Longshoremen's Act must be liberally construed in the conformance with its purpose, and in a way which avoids harsh and incongruous results."

Accord:

Voris v. *Eikel* (1953), 346 U. S. 328.

In addition, we have the long and still vital history of the "Twilight Zone" cases before us. Ever since 1942 in *Davis* v. *Department of Labor and Industries,* 317 U. S. 249, the Supreme Court has held that wherever there is doubt in applying state as opposed to federal compensation acts in maritime situations, the *tribunal chosen by the claimant* has a presumption of valid jurisdiction. *Davis* states:

> "... the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side."

Davis has been interpreted as "... a revolutionary decision deemed necessary to escape an intolerable situation and as designated to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way ..."

Moores' case (Sup. Mass., 1948), 323 Mass. 162, 167, 80 N. E. 2d 478, 480, aff'd (1948) 335 U. S. 874, *sub nom. Bethlehem Steel Co.* v. *Moores.*

The *Calbeck* case (1962), 370 U. S. 114, still makes clear that in any doubtful area the claimant may elect his remedy, and that the Twilight Zone rule still holds.

Respondents would undo all the practical solutions brought forward by the *Davis* case, and applied since 1942.

II. The Longshoremen's Act Applies To Maritime Contracts Of Employment On Man-Made Structures On Or Above Navigable Waters.

Admiralty jurisdiction extends to all damage or injury occurring during the performance of a maritime contract, including contracts of ship, loading and unloading and repair, even though the injury involves piers and wharves over navigable waters.

As indicated in Point I, it is the contractual maritime jurisdiction which allows Jones Act recovery for crew members injured ashore through the negligence of their employer or agents of the employer.

The Longshoremen's Act is based on the New York Workmen's Compensation Act. Because the New York Act regulates the employment contract, it even applies to employees injured in other states so long as New York has an interest in the employment contract.

Baduski v. *S. Gumpert Co., Inc.*, 277 App. Div. 591, 102 N.Y.S. 2d 297, App. dism. 302 N. Y. 702.

Cases in Point I demonstrate the applicability of land-based injuries in conjunction with repair work on drydocks and adjacent land areas. These cases apply to the case at bar since a pier over water is even more "maritime" than land areas near marine railways. Application of the Longshoremen's Act is more apt for areas "over" water than land areas for which relief has been granted.

An accident on a pier or dock built above navigable water is "upon" navigable waters.

As demonstrated above, the Supreme Court has allowed recovery under maritime law for injuries caused by unseaworthy vessels and appurtenances where the impact is on a dock "not remote" from the offending cause (*Gutierrez*).

The federal interest in piers and docks is also shown by the fact that piers and wharves must be recommended and approved by federal authorities. Title 33, Section 403, makes it unlawful to build any "wharf, pier . . ." except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. Section 406 establishes substantial fines (up to $2,500) and/or imprisonment for violations.

The section prohibits "any obstruction" which is not authorized, "to the navigable capacity of any of the waters of the United States . . .".

The national concern is with the effects of structures on navigable waters, and not only on the objects navigating in the waters.

A federal interest in navigable waters is not withdrawn by placing man-made structures on or over such waters.

United States v. *Appalachian Power Co.* (1940), 311 U. S. 377, 408, 409.

Economy L. & P. Co. v. *United States* (1921), 256 U. S. 113, 118, 124.

Impact on a dock or pier has been the basis for recovery under the federal Longshoremen's Act where the employee was thereafter propelled into the water.

Interlake S.S. Co. v. *Nielsen* (6th Cir. 1964), 338 F. 2d 879, cert. den. 381 U. S. 934.

Michigan Mutual Liability Co. v. *Arrien* (2d Cir. 1965), 344 F. 2d 640, cert. den. 382 U. S. 835 (injury on a "stage" of skids extending over the water).

The mere fact that the injured party subsequently went into the water should not be decisive of coverage of the Act where the initial injury was on the dock or pier; if the injury was in maritime employment when it occurred on the pier in these cases it should also be applicable to the case at bar.

If on the other hand an artificial distinction is made between what is "on" and what is "over" navigable water then airplane accidents would be excluded from coverage by the Death On The High Seas Act. But in all logic, such deaths including explosions in airplanes in flight and the like are covered by the Death On The High Seas Act.

D'Aleman v. *Pan American World Airways* (2d Cir. 1958), 259 F. 2d 493.

The word "upon" is susceptible of an interpretation which not only means "on" but "over" and "above". National policy has been established concerning structures which are "over" and "above". A remedial statute which has been construed to go to the limits of federal concern would by both purpose and common sense make the Longshoremen's Act applicable to the situation in this case.

This Court has never definitively decided that an injury on a man-made structure adjacent to ship loading activity is precluded from recovery under the federal Act. It is respectfully submitted that the legislative history of the Act sought this application; it is consistent with the jurisdiction of the Congress over such activities, and the Act presumes coverage of the Act in a borderline activity (Sec. 920).

The legislative history of the Act in 1926 and 1927 indicates that maritime coverage was the purpose of the Act, and that the Act was to be applied as far ashore as the maritime activity itself extended. If navigable waters are involved in a broad, common-sense definition, the employee has an election to come under the federal Act.

Calbeck v. *Travelers Ins. Co.* (1962), 370 U. S. 114. *Holland* v. *Harrison Bros. Dry Dock, etc.* (5th Cir. 1962), 306 F. 2d 369, 372, 373.

From the very beginning of the controversy over federal and state jurisdiction in *Southern Pacific Co.* v. *Jensen* (1917), 244 U. S. 205, 217, it was made clear that a maritime worker whose "employment was a maritime contract" and who received maritime-connected injuries was within the federal concern. See also *Atlantic Transport Co.* v. *Imbrovek* (1914), 234 U. S. 52, 62.

Respectfully submitted,

AMERICAN TRIAL LAWYERS ASSOCIATION,
By Paul S. Edelman,
Attorney for *Amicus Curiae.*

Dated at New York, New York, this day of December, 1967.

Certificate

This is to certify that on the 12 day of December, 1967, copies of the above application to appear as *Amicus Curiae* and brief in support thereof have been forwarded to Hon. Erwin N. Griswold, Solicitor General, United States Department of Justice, Washington, D. C. 20530, Attorneys for C. D. Calbeck, Deputy Commissioner; to the Honorable Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas 77002, Attorneys for Respondents Crown Stevedoring Co. and Texas Employers Insurance Association; and to the Honorable Messrs. Mandell & Wright, 707 South Coast Building, Houston, Texas 77002, Attorneys for Petitioner, Andrew Nicholson.

PAUL S. EDELMAN.

SUPREME COURT, U. S.

FILED

DEC 22 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 877

ANDREW NICHOLSON,

Petitioner,

v.

C. D. CALBECK, DEPUTY COMMISSIONER,
CROWN STEVEDORING COMPANY AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS CROWN STEVEDORING COMPANY AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION IN OPPOSITION

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IN THE

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OCTOBER TERM, 1967

No. 877

ANDREW NICHOLSON,

Petitioner,

v.

C. D. CALBECK, DEPUTY COMMISSIONER,
CROWN STEVEDORING COMPANY AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS CROWN STEVEDORING COMPANY AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION IN OPPOSITION

Respondents Crown Stevedoring Company and Texas Employers' Insurance Association pray that the petition for a writ of certiorari be denied.*

* Respondents Crown Stevedoring Company and Texas Employers' Insurance Association are designated in the caption of the Petition only by an "et al," and the opening paragraph of the Petition omits identifying all of the parties. The Petition acknowledges these respondents are adverse parties by compliance with Rule 33(1), and service of the petition on counsel for these respondents has been made as the Petition's Certificate of Service reflects. The opinion below of the District Court and the Compensation Order of the Deputy Commissioner further reflect the adverse party status of respondents.

OPINIONS BELOW

The opinion of the District Court (Appendix A) is reported at 266 F. Supp. 103. The opinion of the Court of Appeals for the Fifth Circuit (Appendix B) is not yet reported.

The Compensation Order of the Deputy Commissioner (Appendix C) is not published.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was rendered on October 31, 1967. The petition for a writ of certiorari was docketed in this Court on December 4, 1967.

The jurisdiction of this Court to review the judgment complained of by writ of certiorari is conferred by 28 U.S.C.A. 1254(1) and 2101(c).

QUESTION PRESENTED

Whether the Longshoremen's and Harbor Workers' Compensation Act of 1927 should be interpreted to provide workman's compensation benefits to a longshoreman working and injured upon a pier or wharf.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act of 1927 (44 Stat. 1424, 33 U.S.C. 901, *et seq.*) is involved, and the pertinent section thereof (§ 903) provides:

"Section 903. COVERAGE

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

STATEMENT OF THE CASE

Petitioner, Andrew Nicholson, was employed on May 26, 1960, by respondent Crown Stevedoring Company to work as a longshoreman at Manchester Terminal on the Houston Ship Channel. The SS MARY SOPHIA was in port and respondent Crown was performing the stevedoring work for the vessel. Petitioner received injuries to his legs while standing or walking on the Manchester Terminal wharf. Two small fork-lift trucks were moving the vessel's steel hatch beams from one location on the wharf to another. Petitioner was struck and injured when the beams slid from their resting place on the fork-lift trucks and struck the back of his legs. Petitioner was not propelled or knocked from the wharf into the water. He was not lifted off the wharf or suspended by the ship's gear. His injuries were sustained in their entirety and without dispute on the solid non-floating structure of the pier or wharf. The pier or wharf was erected on pilings and concrete blocks which rested in the bed of the waters adjacent to the Houston Ship Channel in the Port of Houston, Texas.

Two photographs are included as part of this Statement of the Case. Figure 1 (which was Respondent's Exhibit No. 5 at the compensation hearing) shows the dockside area of the wharf where Nicholson was injured. He was near the warehouse on the left of the picture. Figure 2 (Respondent's Exhibit No. 9) is a view of the wharf from the channel. The wharf's exterior facing of timber and its interior concrete supports are seen. The Court of Appeals, after seeing these photographs, stated as a matter of law that the waters beneath the wharf were not navigable. Respondents believe the decisions below are correct without regard to whether there was any water at all under the wharf, or its character, but the pictures certainly support the Court of Appeals on this point.

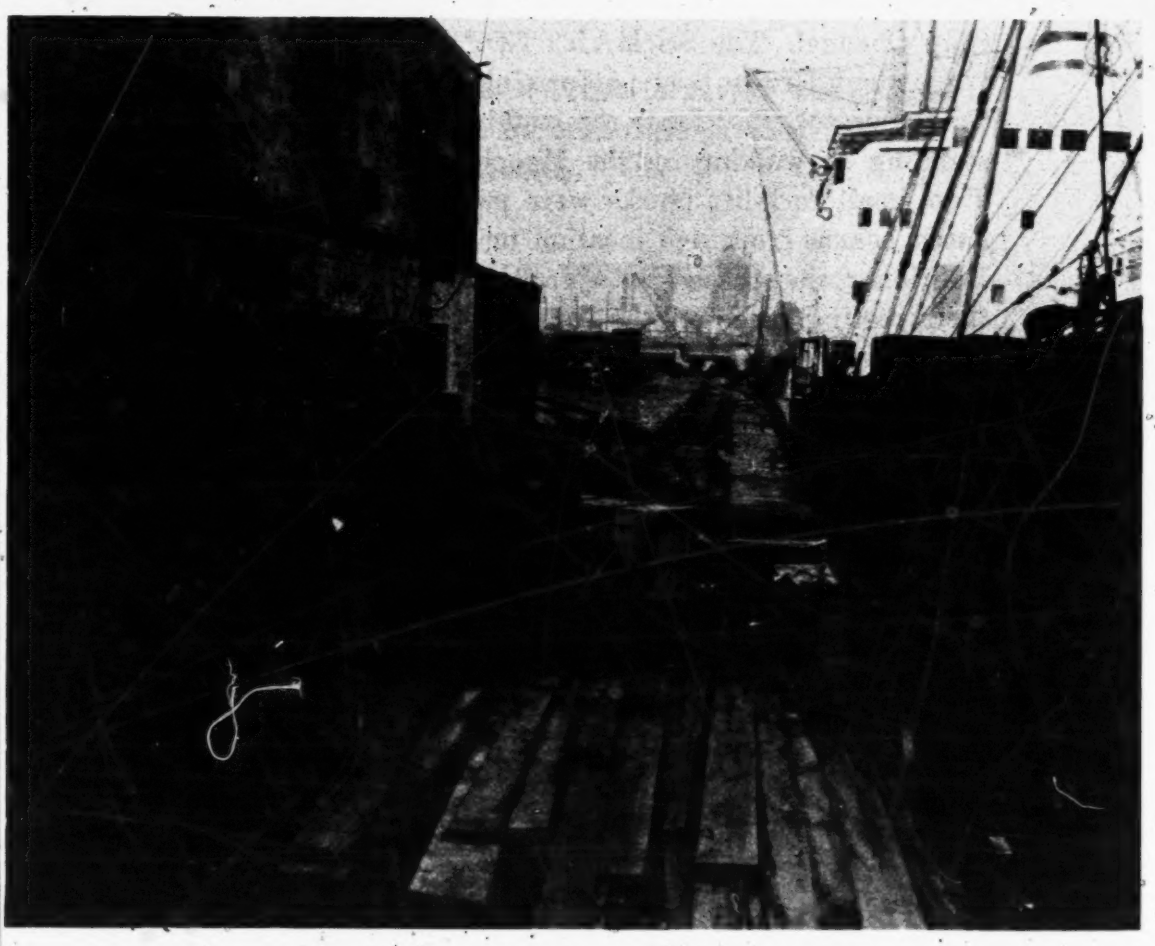

Figure 1. Area of wharf where accident occurred.

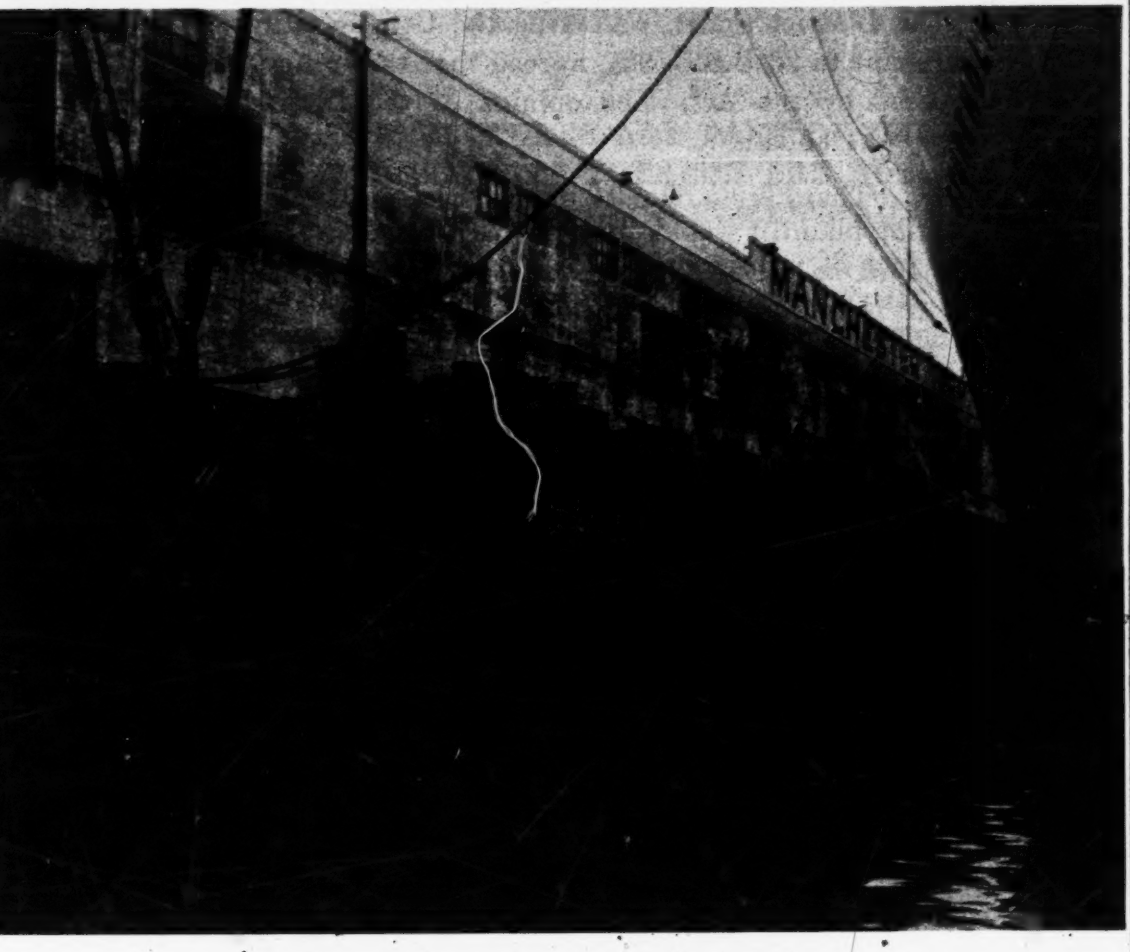

Figure 2. View of wharf from the channel.

Petitioner was paid compensation benefits by respondent Crown and its insurance carrier, respondent Texas Employers' Insurance Association, under the Texas Workmen's Compensation Act.

Petitioner's claim for benefits under the Longshoremen's Act was rejected by the Deputy Commissioner, whose Compensation Order (App. C) concluded:

> "There is no authoritative determination that a dockside accident comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act."

The District Court, reviewing the Compensation Order pursuant to 33 U.S.C. 921, agreed that the injury was not covered by the Act. The opinion of the District Court (App. A) holds:

> "There is no dispute in this case as to the fact that the plaintiff was injured on the wharf. In light of this fact, it is this court's opinion that the Deputy Commissioner correctly rejected the plaintiff's claim for compensation under the Longshoremen's Compensation Act."

The Court of Appeals for the Fifth Circuit affirmed *per curiam* (App. B) leaving undisturbed the decision that petitioner was not entitled to benefits under the Longshoremen's Act.

REASONS FOR REFUSING THE WRIT

Whether the Longshoremen's Act provides a compensation remedy for dockside injuries is the only issue in this case. For forty years this act has been administered and interpreted without a single case ever holding the act applied to an injury which occurred in its entirety upon a dock, wharf or pier. The petition for writ of certiorari should be refused for the following reasons:

1. The decisions of the Deputy Commissioner, District Court, and Court of Appeals were correct.

2. There is no conflict of decisions with any court of appeals or with this Court.

3. This Court, in a series of cases, has laid out a pattern for interpreting the Longshoremen's Act which leaves dockside injuries under state compensation.

ARGUMENT

I.

DOCKSIDE STRUCTURES ARE PART OF THE LAND AND INJURIES THEREON ARE NOT COVERED BY THE LONGSHOREMEN'S ACT

An almost endless collection of cases can be found in which piers, wharves or docks, permanently affixed to the land beneath navigable waters, are declared to be part of the land. Among the leading cases so holding are *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1921); *T. Smith & Son, Inc.* v. *Taylor*, 276 U.S. 179 (1928); and *Swanson* v. *Marra Bros.*, 328 U.S. 1 (1946).

Before compensation under the Longshoremen's Act validly could be awarded to petitioner in this case, the above three cases from the Supreme Court of the United States, as well as a long line of Circuit and District Court opinions, would have to be completely ignored or overruled. In each of these three cases an injury to a longshoreman working on a dock or wharf was involved. In each case the Court considered the question of whether the recovery being sought was jurisdictionally proper. *In each case the Supreme Court held that the dock or wharf was an extension of land and that the propriety of the remedy sought must be considered on the basis that the dock or wharf was land and that the injury occurred on land.* In the first two of these cases, the Supreme Court held that state compensation validly applied because the injury was one that occurred on land and was not beyond the constitutional limits of state compensation as set forth in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

In the third of the above Supreme Court cases, *Swanson* v. *Marra Bros.*, 328 U.S. 1 (1946), the Court had before it the question of whether the Longshoremen's Act could ap-

propriately be applied to cover an injury to a longshoreman working on a pier alongside a vessel loading cargo when he was struck and injured by an object falling from the vessel. The Supreme Court, in considering the appropriate remedies available to the longshoreman against his employer, used the following language in reaching its decision that the dockside locale of the injury precluded benefits under the Longshoremen's and Harbor Workers' Act:

> "... *But since this act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore.* The Act leaves for the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel." (Emphasis added).

The petition claims a conflict in the decision below with the decision of this Court in *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962). The decision below, stripped of argumentative embellishments, is simply that maritime workers injured on a wharf are not covered under the Act because they are not "upon the navigable waters of the United States (including any dry dock)." *Calbeck* holds that the Longshoremen's Act is applicable to maritime employees engaged in new ship construction on vessels afloat in navigable waters because they are "upon the navigable waters". Nowhere in *Calbeck* does this Court direct the Longshoremen's Act to be applied to dockside injuries. The conflict claimed does not exist.

The petition alternatively claims the decision is contrary to the opinions of this Court in *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940), and *Economy Light Co.* v. *United States*, 256 U.S. 113 (1921). Neither case

dealt with the Longshoremen's Act, nor for that matter do these cases even involve maritime injuries. These cases are disputes between utility companies and the United States over the power of Congress to regulate activities on public waters capable of being used as highways for interstate commerce. The navigability of a waterway for purposes of the commerce power of Congress bears no meaningful relationship to a determination that an injury on a wharf is not "upon the navigable waters", and the cases have no proper application to the question presented. No conflict as alleged exists.

A very brief review of the authorities shows that piers, wharves and similar structures have uniformly been characterized as part of the land, and not part of the water about them. In *American Export Lines, Inc.* v. *Revel,* 266 F. 2d 82 (4th Cir. 1959), a longshoreman was injured while standing on a pier in Norfolk, Virginia, while loading a vessel. The Court of Appeals stated:

> "Since Revel was injured *while standing on the dock, (an extension of the land) his remedies are restricted to those afforded by the local law,* Swanson v. Marra Bros., 328 U.S. 1; Industrial Commission v. Nordenholt, 259 U.S. 263 (1922); cf. the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S. Code, Sec. 903 . . ." (Emphasis added).

The rule was stated in *The Senator Rice,* 234 Fed. 101 (E.D.N.Y. 1916), in these words:

> "The rule apparently now well-established is to the effect that a platform erected upon posts or piles and given the character of a dock or land structure, even though entirely isolated from the land and standing in navigable water, is a part of the land itself . . .".

And in *The Haxby,* 95 Fed. 170 (E.D. Pa. 1899), this language is found:

> "Where, then, was the injury done in contemplation of the law, upon the land (the pier being land) or upon the navigable waters of the river? . . . I incline to the view that the injury should be regarded as done upon land."

For additional cases following the rule that a dock, pier, wharf or other man-made structure must be considered as part of the land, reference is made without further discussion to the cases of *Hastings* v. *Mann,* 226 F. Supp. 962 (D.C. N.Car. 1964), affirmed 340 F. 2d 910 (4th Cir. 1965) certiorari denied 380 U.S. 963; *Conner* v. *United States,* 87 F. Supp 847 (E.D. Pa. 1940); *Seifort* v. *Keansburg Steamboat Co.,* 19 F. Supp. 967 (S.D.N.Y. 1937); *Jeffers* v. *Foundation Company,* 85 F. 2d 24 (2d Cir. 1936); *Massman Construction Co.* v. *Bassett,* 30 F. Supp. 813 (E.D. Mo. 1940), rev. on other grounds, 120 F. 2d 230 (8th Cir. 1941); and *Netherlands American Steam Nav. Co.* v. *Gallager,* 282 Fed. 171 (1922).

What have the circuit courts done and said about whether the Longshoremen's Act and its "upon navigable waters" coverage includes dockside injuries? The Fifth Circuit, in addition to the decision below, previously considered the question in two cases. In *O'Keeffe* v. *Atlantic Stevedoring Co.,* 354 F. 2d 48 (5th Cir. 1965), a difficult factual issue of where the injury occurred highlighted the court's statement (page 50) of the rule. "Docks, wharves, piers and similar structures are regarded as extensions of the land and injuries occurring there are not under the coverage of the Act." The longshoreman was killed when lifted from the dock, caused to strike the side of the ship and finally dropped into the water between the ship and wharf. Confusion over where the injury had occurred had resulted in conflicting decisions on coverage by the Deputy Commissioner and the District Court. The court wrote, on page 50:

> "The difficult problem is the determination as to the place where the injury occurred. It is the place where the injury occurred that determines whether there is Longshoremen's Compensation coverage. *If the ship's boom had swung over the dock, striking and causing the death of Curry, we would not be able to find a basis for recovery under the Act. The place of the injury would have been the dock.*" (Emphasis added).

More recently the Fifth Circuit decided *Travelers Insurance Company* v. *Shea,* 382 F. 2d 344 (5th Cir. 1967). The opinion below relies on this case. A floating outfitting pier permanently attached to the shore and bottom of the Sabine River was the location of the ship repairman's injury. The opinion, a copy of which appears as Appendix B in the Petition, turns on the conclusions that the structure was an extension of land and that the waters beneath it had been removed from navigation. The injury was found under these circumstances not to have been within the coverage of an act which requires the site of injury to be "upon the navigable waters of the United States (including any dry dock)." A petition for writ of certiorari is now pending as No. 788, McCollough v. Travelers Insurance Company, before the Court.

Whether the waters beneath dockside structures are considered removed from navigation, as the court below discussed, would not seem to be a necessary finding in support of the decision. Where the injury occurs on an extension of land, such as the wharf in this case, the navigability of the waters beneath the structure should not be a material inquiry. It is the land extension, not the water, upon which the injury occurs. Examination of the evidence in this case, however, supports the court below in its declaration that the water was not navigable. The reference in the opinion to a "canoe" was not intended to define the type vessel capable of navigating between the pilings. This reference, as Figure No. 2 on page 5 reflects, was a somewhat barbed

rejection by the court of appeals below that the waters beneath the wharf were freely navigable.

The Ninth Circuit Court of Appeals, in a case involving the identical issue, has affirmed the rejection of a claim for compensation under the Longshoremen's Act for a dockside injury in *Houser* v. *O'Leary*, 383 F.2d 730 (9th Cir. 1967), affirming 253 F. Supp. 417 (D. Ore. 1966). Judge Merrill's succinct opinion, just published in the December 11, 1967 Advance Sheet No. 2 of 383 F.2d at 730, notes the absence of any conflict in decisions on this issue. The opinion further stresses that the Supreme Court in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962), strongly suggests that the administration of the Longshoremen's Act is best served by the clearly defined application of the act to injuries on navigable waters, leaving to state compensation the shoreside cases. The Ninth Circuit reaffirmed the correctness of its prior decision on this issue in *Johnston* v. *Marshall*, 128 F.2d 13 (9th Cir. 1942).

The Court's attention is directed to *John W. McGrath Corp.* v. *Hughes*, 264 F. 2d 314 (2d Cir. 1959), certiorari denied 360 U.S. 931. In this case, the Second Circuit Court of Appeals noted that an injury occurring on the dock would not be compensable under the Longshoremen's Act. The Court stated at 316:

> ". . . But we must still be satisfied that there was sufficient evidence for the Deputy Commissioner properly to find that the alleged incident truly happened, arising out of and in the course of employment, 33 U.S.C.A. § 902(2), *and occurring not on the dock* but upon the navigable waters of the United States, 33 U.S.C.A. § 903(a);." (Citing Johnston v. Marshall, supra, and Jeffers v. Foundation Co., supra.) (Emphasis added).

The Second Circuit Court of Appeals has more recently spoken again on the coverage question, and in *Michigan*

Mutual Liability Co. v. *Arrien,* 344 F. 2d 640 (2d Cir. 1965), certiorari denied 382 U.S. 835, reaffirmed that it would not apply the Act to a longshoreman injured on the wharf. The claimant was injured on a temporary skid bridging the space between vessel and wharf, and the court found this to be analogous to a gangway, and not part of the wharf.

In *Wiper* v. *Great Lakes Engineering Works,* 340 F. 2d 727, 730 (6th Cir. 1965), certiorari denied 382 U.S. 812, the Sixth Circuit Court of Appeals clarified its position and stated that docks and wharves are considered extensions of land and that it is the place where the injuries occur which determines coverage under the Longshoremen's Act.

On the district court level, and to the same effect, is the outstandingly comprehensive opinion of Judge Dorsey Watkins in *Johnson* v. *Traynor,* 243 F. Supp. 184 (D. Md. 1965). Two longshoremen on the pier hooking up steel beams in a rail car were injured, one fatally, when a draft of cargo hoisted by the ship's cargo gear, swung back and struck them. Since the injuries occurred on the pier, Judge Watkins concluded the compensation remedy would be under state law, and not under the Longshoremen's Act. The opinion discusses and rejects the identical arguments advanced by petitioner, and almost every case on the question here involved is carefully considered.

Other recent District Court decisions directly in point and in accord include *Houser* v. *O'Leary,* 253 F. Supp. 417 (D. Ore. 1966), affirmed 383 F. 2d 730 (9th Cir. 1967) (longshoremen injured in fall from rail car on pier while hooking onto a load of creosoted piling); *East* v. *Oosting,* 245 F. Supp. 51 (E.D. Va. 1965) (consolidated cases of a cargo checker on pier under shed struck on leg by bale of wool falling off fork lift truck, and a longshoreman hooking up logs in open rail car on pier crushed by logs attached to ship's gear); and *Tarabocchia* v. *J. W. McGrath Corp.,*

270 F. Supp. 605 (S.D.N.Y. 1966) (longshoreman fell from pier warehouse to the pier below). In each case compensation claims under the Longshoremen's Act were made. In each case the courts found no jurisdiction because the situs of each injury was a pier or wharf, and such locations were not "upon the navigable waters" as required under the Longshoremen's Act.

State court cases have likewise determined that dockside injuries are not within the coverage of the Longshoremen's Act because they occurred on land; e.g., *Stansbury* v. *Atlantic & Gulf Stevedores, Inc.*, 159 So. 2d 728 (La. App. 1964), writ refused 161 So. 2d 277 (La. 1964), and *Stott* v. *Thompson*, 14 N.E. 2d 246 (Ill. App. 1938), certiorari denied 305 U.S. 639.

II.

LEGISLATIVE HISTORY SHOWS DOCKSIDE INJURIES NOT COVERED

It was settled law prior to the passage of the Longshoremen's Act that dockside injuries to longshoremen fell within the coverage of state compensation laws, but that state laws could not constitutionally be extended to provide compensation for injuries on board vessels being loaded by these longshoremen. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917). When Congress passed the Longshoremen's Act, it left undisturbed the applicability of state compensation laws to dockside injuries. Congress in fact "never wanted to pass the Longshoremen's Act in the first place", and was "determined to leave as much as possible to the state commissioners". See Gilmore & Black, *Admiralty*, p. 346 (1957). This intent is seen in that portion of Section 903(a) which provides:

> "Compensation shall be payable under this Chapter . . . only . . . if recovery for the disability or death

through Workmen's Compensation proceedings may not validly be provided by State Law."

The purpose of the Act is stated in Senate Report No. 973, 69th Congress, First Session, at page 16, which is quoted in *Johnson* v. *Traynor,* 243 F. Supp. 184 (D. Md. 1965):

> "The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting and repairing ships; but it should be remarked that *injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship* so as to bring them within the maritime jurisdiction of the United States." (Emphasis by the Court).

In addition, the House Report accompanying the Longshoremen's and Harbor Workers' Safety Program Act, 1958 U.S. Code Cong. News, page 3843, states:

> "The Longshoresmen's and Harbor Workers' Compensation Act provides compensation for injuries suffered by longshoremen, ship repairmen, ship servicemen, and workers in related employment when they are working for private employers within the Federal maritime jurisdiction on the navigable waters of the United States, including drydocks. *These employees are subject to the protection of State safety standards when performing work on docks and in other shore areas . . .*".

Petitioner's argument that Congress intended the Longshoremen's Act to have a coverage as broad as the "admiralty jurisdiction" is supported by quotations from various witnesses who testified at Senate or House hearings on the Act. While some of these witnesses wanted an act broad enough to "cover the contract, cover the job and not simply

the man when he is on the ship" (Mr. L. D. Clark for the Bureau of Labor Statistics, Senate Hearings, p. 40, as quoted in *Johnson* v. *Traynor,* 243 F. Supp. 184 (D. Md. 1965). The language of the act, its overall legislative history (including the absence of any coverage amendments following interpretive decisions), and the decisions of the courts demonstrate these witnesses did not get such an Act.

The various forms of bills and the changes in coverage language of Section 903 leading to the final enactment of "upon the navigable waters" — instead of "within the admiralty jurisdiction" — point to a narrowing of coverage rather than a broader intent. This history is accurately and carefully considered by Judge Watkins in *Johnson* v. *Traynor, supra,* 243 F. Supp. 184, 188-197 (D. Md. 1965).

III.

ADMIRALTY EXTENSION ACT DID NOT ENLARGE LONGSHOREMEN'S ACT

Petitioner suggests that the Longshoremen's Act's coverage was extended by virtue of the enactment of the Admiralty Extension Act of 1948, 62 Stat. 496, 46 U.S.C. 740. This act merely extends a remedy in admiralty for money damages on account of injury to persons or property caused by a vessel on navigable waters, notwithstanding that such injury was done or consummated on land. The act was in no way designed to extend coverage under the Longshoremen's Act. No mention of the Longshoremen's Act is contained in the Extension of Admiralty Act. The act is concerned with tort damages caused by vessels. It is not concerned with compensation remedies between employees and employers.

The legislative history of the Admiralty Extension Act shows that Congress did not extend the effect of that act

beyond its specific terms. See Senate Report No. 1593, 80th Congress, 2nd Session, 1948 U.S. Code Cong. Service, page 1899:

> *"This legislation is not intended* to affect existing rights of seamen against their vessels or against private companies who operate Government owned vessels, or *to affect remedies which may exist against other parties involved by existing law in any appropriate forum."* (Emphasis added).

The argument that the Admiralty Extension Act extended the coverage under the Longshoremen's Act to dockside injuries has been flatly rejected by the courts in *Travelers Insurance Co.* v. *Shea,* 382 F.2d 344 (5th Cir. 1967); *Houser* v. *O'Leary,* 383 F.2d 730 (9th Cir. 1967); *American Export Lines, Inc.* v. *Revel,* 266 F.2d 82 (4th Cir. 1959); *Johnson* v. *Traynor,* 243 F. Supp. 184 (D.Md. 1965); and *East* v. *Oosting,* 245 F. Supp. 51 (E.D.Va. 1965).

Petitioner's reliance on the Sixth Circuit's opinion in *Interlake Steamship Co.* v. *Nielsen,* 338 F.2d 879 (6th Cir. 1964), certiorari denied 381 U.S. 934, is particularly misplaced. The case certainly did not hold that the Admiralty Extension Act brought dockside injuries within the coverage of the Longshoremen's Act. The injury resulted when the compensation claimant drove his car off the dock. He died of a skull fracture occasioned when he struck the frozen surface of the navigable waters of Lake Erie, and the court had no difficulty in placing the situs of injury and death "upon the navigable waters" and within the coverage of the Longshoremen's Act. Less than two months later, in *Wiper* v. *Great Lakes Engineering Works,* 340 F.2d 727 (6th Cir. 1965), certiorari denied 382 U.S. 812, the Sixth Circuit had occasion to discuss *Nielsen* and pointedly remarked that Longshoremen's Act coverage was based on the injury or death being in navigable waters and not on the dock.

The reported opinion cited by appellant in *Boston Metal Co.* v. *O'Hearne,* 329 F. 2d 504 (4th Cir. 1964), certiorari denied 379 U.S. 824, does not even mention the Admiralty Extension Act. Petitioner furnishes no citation to the unreported, oral opinion from the District Court, but since the compensation claimant was injured working on board a vessel partially aground in navigable waters, the case is not in point.

The remaining cases cited by Petitioner on this point are tort cases involving liability suits against shipowners, which the Admiralty Extension Act was specifically enacted to cover. These cases are not material to the issue before this Court.

For a detailed analysis of the legislative history of both the Longshoremen's Act and the Admiralty Extension Act, reference is again made to Judge Watkins' opinion in *Johnson* v. *Traynor,* 243 F. Supp. 184, 188-197 (D. Md. 1965).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

CARL G. STEARNS
S. G. KOLIUS
ED BLUESTEIN, JR.
Bank of the Southwest Building
Houston, Texas 77002
Attorneys for Respondents
Crown Stevedoring Company
and Texas Employers'
Insurance Association

Of Counsel:

FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI

December, 1967

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing brief in opposition were mailed to Mr. Arthur J. Mandell and Mr. Herman Wright, Mandell & Wright, 707 South Coast Building, Houston, Texas 77002, counsel for petitioner, with first class postage prepaid, and to the Solicitor General, Mr. John C. Eldridge and Mr. Leavenworth Colby, Department of Justice, Washington, D. C. 20530, with air mail postage prepaid, and to Mr. Jack Shepherd, Assistant United States Attorney, Federal Office Building, 515 Rusk Avenue, Houston, Texas 77002, with first class postage prepaid, by depositing same in the United States mail, properly stamped and addressed, on this 20th day of December, 1967.

CARL G. STEARNS

APPENDIX A

Filed 18 day of Oct., 1966
V. Bailey Thomas, Clerk
By Albert E. Anderson, Deputy

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANDREW NICHOLSON, *Plaintiff*, v. C. D. CALBECK, DEPUTY COMMISSIONER, ET AL, *Defendants.*	CIVIL ACTION No. 65-H-63

Mandell & Wright (Herman Wright) of Houston, Texas; for plaintiff.

Jack Shepherd, Assistant U. S. Attorney of Houston, Texas; for Deputy Commissioner.

Fulbright, Crooker, Freeman, Bates & Jaworski (S. G. Kolius and Ed Bluestein, Jr.) of Houston, Texas; for Crown Stevedoring Company and Texas Employers' Insurance Association.

October 18, 1966

Memorandum:

This case comes to the court upon a complaint filed by the plaintiff seeking to enjoin the enforcement of a compensation order issued by defendant Deputy Commissioner on January 13, 1965. The action is now before the court

for consideration of motions for summary judgment filed by both plaintiff and defendants.

The case is presented to this court on the pleadings of the parties, the record developed in the hearing before the defendant Deputy Commissioner, and is accompanied by extensive briefs submitted on behalf of all parties. There is no dispute between the parties as to the facts as found by the Deputy Commissioner, but they differ sharply as to the legal conclusions which may be arrived at from the record.

The sole question presented to this court is whether the loss occasioned by the plaintiff's injury is compensable under the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. 901, et seq. ("Longshoremen's Compensation Act").

The pertinent facts in this case are as follows: The plaintiff, a longshoreman, was assigned to work on the Manchester wharf in Houston, Texas, unloading a merchant vessel on the day the injury occurred. This wharf is a concrete structure and is attached to the land. The waters of the Houston Ship Channel flow under a portion of the wharf.

On the morning of the day the injury occurred, two large hatch beams had been removed from the ship and placed on the wharf by means of the ship's winches. These beams were placed on wooden pallets, one atop the other. Later in the day, it became necessary to shift the vessel farther up the wharf and members of the longshoremen gang were instructed to move the hatch beams up the wharf. The beams were being moved up the wharf by means of two forklift vehicles when the injury occurred. As the beams were being carried past the plaintiff, who was standing on

the wharf, the top beam fell from the pallet on which it was placed and struck and seriously injured him.

The plaintiff made application for compensation pursuant to Section 913 of the Longshoremen's and Harbor Workers' Compensation Act, and a hearing was held before the Deputy Commissioner for the Eighth Compensation District, C. D. Calbeck, commencing on December 22, 1964. The Deputy Commissioner rejected the plaintiff's claim for compensation on the basis that dockside injuries are not compensable under the provisions of the Longshoremen's Compensation Act.

Section 903 of the Longshoremen's Compensation Act provides:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring *upon the navigable waters of the United States* (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." (Emphasis added).

There is no dispute in this case as to the fact that the plaintiff was injured on the wharf. In light of this fact, it is this court's opinion that the Deputy Commissioner correctly rejected the plaintiff's claim for compensation under the Longshoremen's Compensation Act.

This view is strongly supported by the recent Fifth Circuit case of O'Keeffe, Deputy Commissioner, v. Atlantic Stevedoring Co., Inc., 354 F. 2d 48 (5 CA, 1965). In this case, the Circuit Court of Appeals upheld an award of the Deputy Commissioner to the widow of a longshoreman who was killed while loading a vessel. The court specifically affirmed the fact finding of the Deputy Commissioner that

the injury did not occur on the dock, but occurred over navigable waters after the victim had been lifted from the dock and carried out from the dock and dropped in the water between the ship and the wharf. In discussing the scope of the coverage under the Longshoremen's Compensation Act, the court made these observations at page 50:

> "The difficult problem is the determination as to the place where the injury occurred. It is the place where the injury occurred that determines whether there is Longshoremen's Compensation coverage. *If the ship's boom had swung over the dock, striking and causing the death of Curry, we would not be able to find a basis for recovery under the Act. The place of the injury would have been the dock.*" (Emphasis added).

In the instant case, it is clear the injury occurred on the dock, and thus is not within the scope of the Act.

The recent unreported case of Johnson v. Traynor, Adm. No. 4704 (D. Md. 1965), furnished by the defendants, is directly in point and supports the finding of this court. In that case, Judge Watkins, in an extensive and scholarly opinion, found that the Longshoremen's Compensation Act did not provide coverage for the widow of a longshoreman who fell from a railroad car onto a pier and was killed. The court based its opinion on the fact that the injury occurred on the pier and not "on the navigable waters of the United States."

In Swanson v. Marra Brothers, Inc., 328 U.S. 1, 7 (1946), the Supreme Court in discussing the scope of the Longshoremen's and Harbor Workers' Compensation Act, quoted from Sen. Rep. No. 973, 69th Cong., 1st Sess., p. 16, as follows:

> "These men are mainly employed in loading, unloading, refitting, and repairing ships, *but it should be*

> *remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship* so as to bring them within the maritime jurisdiction of the United States." (Emphasis added).

The Court then stated that the Longshoremen's Compensation Act "is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore." This statement, in conjunction with the long line of authorities holding that a structure permanently affixed to the soil such as a wharf is considered as part of the land, see e.g. T. Smith & Son v. Taylor, 276 U.S. 179 (1928), Industrial Commission of N. Y. v. Nordenholt Corp., 259 U.S. 263 (1922), further supports the prevalent view that the Longshoremen's Act was not intended to cover injuries occurring on a wharf.

Subsequent to the Swanson case, there have been several decisions from the Circuit Courts of Appeals upholding the view that an injury occurring on a dock is not compensable under the Longshoremen's Act. See O'Keeffe, Deputy Commissioner, v. Atlantic Stevedoring Co., Inc., supra; American Export Lines v. Revel, 266 F.2d 82 (4 CA 1959); McGrath Corp. v. Hughes, 264 F.2d 314 (2 CA 1959), cert. denied, 360 U.S. 914.

The plaintiff relies primarily on Calbeck, Deputy Commissioner, v. Travelers Ins. Co., 370 U.S. 114 (1962), in support of his position. As Judge Watkins stated in his opinion, Johnson v. Traynor, supra, at page 24, a careful reading of the Travelers Ins. Co. case shows that it doesn't support the plaintiff's position, but is actually contra to it. In the Travelers Ins. Co. case, the court finds specifically that the injury occurred on navigable waters and further observes that the purpose of the Longshoremen's Act was

to provide a remedy for injuries occurring *on navigable waters*. In the case now before this court, the injuries did not occur on navigable waters, but rather on a wharf adjacent to navigable waters.

The plaintiff cites Spann v. Lauritzen, 344 F. 2d 204 (3 CA 1965), cert. denied, 382 U.S. 938, Huff v. Matson Navigation Co., 338 F. 2d 205 (9 CA 1964), cert. denied, 380 U.S. 943 (1965), and Forkin v. Furness Withy & Co., Ltd., 323 F. 2d 638 (2 CA 1963), as holding that a court has admiralty jurisdiction over a longshoreman injured on a dock. These cases are not applicable to the case before this court as none of them arose under the Longshoremen's Compensation Act. This court recognizes that the traditional "maritime jurisdiction" for torts is broader than the limitation of coverage to injuries occurring "on navigable waters" found in the Longshoremen's Compensation Act. Johnson v. Traynor, supra. This court does not find the dicta in Caldaro v. Balt. & Ohio. R.R. Co., 166 F. Supp. 833 (E.D.N.Y. 1956), presuasive in light of subsequent cases reviewed earlier in this opinion.

Accordingly, this court holds that the compensation order denying compensation benefits complained of in this case is in accordance with the law.

The plaintiff's motion for summary judgment will be denied. The defendants' motion for summary judgment will be granted.

The clerk will notify counsel to draft and submit appropriate judgment.

/s/ Joe Ingraham
United States District Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24342

ANDREW NICHOLSON,
Appellant,

versus

C. D. CALBECK, Deputy Commissioner, ET AL,
Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(October 31, 1967.)

Before WISDOM and GOLDBERG, Circuit Judges, and SEALS, District Judge.

PER CURIAM: This appeal is from a judgment dismissing the complaint brought by an injured employee, the appellant, under 33 U.S.C. § 921(b) and 5 U.S.C. 700, to review and set aside the determination of the Deputy Commissioner that the claimant was not entitled to benefits under the Longshoreman's and Harbor Workers' Act, 33 U.S.C. § 903(a).

On May 26, 1960, Andrew Nicholson, claimant-appellant, was injured while performing service as a longshoreman for his employer. He performed his work upon a pier erected on pilings and concrete blocks resting on the bed

of navigable waters of the United States. The inshore edge of the pier is attached to the outboard edge of the employer's warehouse, a portion of which is also over water so that the inshore edge of the pier is not attached to or supported by land. In preparing to load the SS "Mary Sophia", some "tween deck beams" were placed on the pier. During the loading it became necessary to move the vessel. Rather than place the beams back on the vessel, forklifts were used to move the beams to the vessel's new position. As Nicholson was assisting in this moving, the beams slid from their resting place on the forklifts, striking him on the back of his legs. The Commissioner and the district court held that the accident did not come within the provisions of the Longshoremen's Act because the claimant was not injured "upon the navigable waters of the United States".

The disposition of this case is controlled by the recent decision of this Court in *Travellers Insurance Company v. Shea, Deputy Commissioner, and McCollough*, No. 23492, decided August 9, 1967. In *McCullough* this Court held that the waters under a floating pier permanently attached to the shore were no longer "navigable waters". The Court distinguished between waters under a pier and waters under a vessel. See *Michigan Mutual Liability Co. v. Arrien*, 2 Cir. ....., 344 F. 2d 640.

In the present case, the Deputy Commissioner found as a fact that the waters underneath the pier continued to be freely navigable by small crafts. Photographs demonstrate that no small craft larger than a canoe could navigate under the pier. The limited navigability of the waters under the pier is characteristic of piers generally and as a matter of law is not navigability within the meaning of the term "navigable waters".

The judgment is AFFIRMED.

APPENDIX C

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
EIGHTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

ANDREW NICHOLSON
Claimant
v.
CROWN STEVEDORING COMPANY
Employer
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Insurance Carrier

COMPENSATION ORDER
REJECTION OF CLAIM
Case No. 4455-[illegible]

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and

A hearing having been duly held in conformity with law,

The Deputy Commission makes the following

FINDINGS OF FACT

1. On May 26, 1960, the employee above named was in the employ of the employer above named, whose address was 324 Shell Building, Houston, Texas, in the Eighth Compensation District. The employer was subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer for compensation under the said Act was insured by the Texas Employers' Insurance Association.

2. On the said day the employee herein sustained injury resulting in disability, while performing service as a longshoreman for the employer upon a dock, wharf, or pier and hereafter referred to as "dock." On said day said stevedoring work on the S/S "MARY SOPHIA" was being performed by the Crown Stevedoring Company. The said dock was upon, over or above navigable waters of the United States. Said dock was erected on pilings and concrete blocks which rested in the bed of navigable waters of the United States. The inshore edge of the dock is attached to the outboard edge of the employer's warehouse, a portion of which likewise is upon, over or above navigable waters of the United States so that the inshore edge of the dock is not attached to or supported by land. In preparing the vessel to load some cargo, some 'tween deck beams were placed out on the dock because there was no place on the vessel to stow the beams, as the hatch cover was removed. A pallet was placed on the dock and the first beam placed on its side on the pallet.

3. Later in the day, it became necessary to shift the vessel. Rather than place the beams back on the vessel to be shifted with the vessel itself, forklifts were used to pick up the beams and thus carry them down the dock to the new position of the vessel. The employee proceeded on down the dock to where the vessel was shifted. As he reached a point about midway of the two ends of the beams, one of the fingerlifts hit a railroad track on the dock which caused the loads to bounce. The said beams were part of the ship's gear used to cover up the hatch openings.

4. The employee sustained his injury while assisting in moving portions of the vessel (its hatch beams) to a new loading location for the vessel alongside the said dock. As two of the employee's fellow gang-members were moving the beams along the dock by means of forklifts, the beams

slid from their resting place on the forklifts, striking employee on the back of his legs.

5. The employee sustained an above-the-knee amputation of the right leg. The left lower leg, below the knee, the skin over the middle half of the leg was very thin. There were several small areas where the skin had been broken and adhered. The skin adhered or stuck to the tibia or leg bone. There was a well-healed, curved, surgical incision on the middle third at the front of the leg. There was marked tenderness immediately below this. There was a slight swelling of the left foot in the metatarsophalangeal joint, where the little toe joins the foot, which was dislocated. The range of motion of the ankle was limited to ten degrees. There were healed fractures of the first, second, and fourth metatarsals with mal or angular union and dislocation of the little toe on the metatarsal.

6. The employee cannot stand properly on the left foot without crutch or crane. He cannot do any significant amount of manual labor. The employee is 63 years of age. His work experience is limited to manual labor and his education extends only to the third grade. Following the injury the employee was incapable of performing his pre-injury work and therefore he had suffered an impairment of his wage-earning capacity, i.e.: permanent total disability.

7. It is common practice in the Port of Houston for some longshoremen to work on the dock and later on the vessel or first on the vessel and later on the dock. There is an interchange of such work. The employees report to the Union Hall for hiring. Any time a gang is called to work general cargo, some members of the gang may work on the vessel and some on the dock, but the employees of the gang do not know at the Union Hall whether the work assignment

is to be on the dock or on the vessel. After the gang reaches the vessel, they learn what work is to be done, and the work assignment is then given. There is no difference in the rate of pay of the gang except for the foreman, whether they are working on the vessel or on the dock, but there might be a pay differential depending on the type of cargo handled.

8. At the time of the employee's injury the employer had other employees who were engaged in maritime employment upon the navigable waters of the United States.

9. Longshore work includes the loading or unloading of cargoes or moving or handling the same on any dock, platform or place or in any warehouse or other place of storage. This is a dockside accident that arose out of and in the course of the employee's employment. At the time of the employee's injury, he was engaged in service connected with the loading of a vessel. Taken as a whole, the accident occurred on the dock which was a means, or connecting link, in furnishing ingress to and egress from the said vessel.

10. Written notice of injury was not given to the employer within thirty days, but the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice. The employer furnished the employee with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act. The average weekly wage of the employee at the time of injury was $94.46. He was not paid full wages for day of injury.

11. As a result of the injury the employee became wholly disabled on May 26, 1960, and such disability is continuing and is permanent.

12. The employer and the insurance carrier have paid $6,160.00 as disability benefits under the Texas Workmen's Compensation Act, for which they are entitled to take credit.

Upon the foregoing findings of fact, it is ORDERED by the Deputy Commissioner that the claim for compensation be and it is hereby REJECTED for the following reason:

There is no authoritative determination that a dockside accident comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand and filed at Galveston, Texas, this 13th day of January, 1965.

/s/ C. D. Calbeck

C. D CALBECK

Deputy Commissioner
Eighth Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent to the claimant, the employer, and the insurance carrier at the last known address of each as follows:

By Registered Mail:

ANDREW NICHOLSON	779 Rosie Houston, Texas
CROWN STEVEDORING COMPANY	c/o Texas Employers Insurance Association 338 South Wayside Drive Houston, Texas
TEXAS EMPLOYERS' INSURANCE ASSOCIATION	338 South Wayside Drive Houston, Texas

By Regular Mail:

Mandell & Wright, Attorneys	South Coast Building Houston, Texas
Fulbright, Crooker, Freeman, Bates & Jaworski, Attorneys	Bank of the Southwest Bldg., Houston, Texas
Bureau of Employees' Compensation	U. S. Department of Labor Washington, D. C. 20211

/s/ C. D. Calbeck
C. D. CALBECK
Deputy Commissioner

Mailed: January 13, 1965

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 877

ANDREW NICHOLSON, PETITIONER

v.

C. D. CALBECK, DEPUTY COMMISSIONER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

1. Petitioner is a longshoreman whose claim under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, was rejected by the Deputy Commissioner on the ground that a pierside injury is not covered by the Act (R. 6).[1] Both the district court and the court of appeals affirmed the denial of the claim on this ground.

The injury occurred on a pier while some hatch beams, which had been removed from a ship to facilitate loading, were being moved to a different part of the pier and accidentally struck petitioner. The pier

[1] "R." references are to the "Reproduction of Portion of the Original Record" filed with the court of appeals.

285-590—67

was erected on pilings and concrete blocks resting on the bed of navigable waters of the United States. The inshore edge of the pier was attached to the outboard edge of the employer's warehouse, and was not attached to or supported by land (R. 2). The courts below held that the injury did not occur "upon the navigable waters of the United States" within the meaning of the Act, 33 U.S.C. 903(a), since piers have traditionally been viewed as extensions of land. The Fifth Circuit rested its per curiam affirmance on its recent decision in *Travelers Ins. Co.* v. *Shea,* 382 F. 2d 344, pending on petition for certiorari *sub nom. McCollough* v. *The Travelers Ins. Co.,* No. 788, this Term, in which it had held that an injury on a permanently anchored floating pier did not occur upon navigable waters within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.[2]

2. We believe that the decision below is correct. The Longshoremen's Act was passed to remedy the gaps and uncertainties created by a series of decisions holding that State workmen's compensation acts could not constitutionally apply to injuries within the sphere of maritime law, *e.g., Southern Pacific Co.* v. *Jensen,* 244 U.S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149; *Washington* v. *W. C. Dawson & Co.,* 264 U.S. 219, except in unpredictable circumstances, see *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469; *State Industrial Commission* v.

[2] Because of the peculiar facts in *McCollough*, we supported the claimant's position in the lower courts. Being of the view, however, that the case turns on its own facts, the government, on behalf of the Deputy Commissioner, has not sought or supported review by this Court.

Nordenholt Corp., 259 U.S. 263. It was settled, however, before the passage of the Act that injuries occurring on docks, wharves, and piers were compensable under State workmen's compensation laws, since the injuries were not maritime in nature. See *State Industrial Commission* v. *Nordenholt Corp., supra; T. Smith & Son, Inc.* v. *Taylor*, 276 U.S. 179, 181, 182. The federal enactment was not intended either to supersede or to duplicate areas of clear State coverage, as its language clearly shows. See 33 U.S.C. 903 (a). Furthermore, the relevant Senate Report stated:

> [I]njuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States.

S. Rep. No. 973, 69th Cong., 1st Sess., p. 16.[3]

This Court subsequently indicated in *Swanson* v. *Marra Bros., Inc.*, 328 U.S. 1, that injuries on docks, wharves, and piers were not covered by the Act. In *Swanson*, the Court explained why an employee who suffered a pierside injury is restricted to local remedies:

> [S]ince * * * [the Longshoremen's] Act is restricted to compensation for injuries occurring on navigable waters, *it excludes from its*

[3] The reference to coverage of injuries "between the wharf and the ship" was perhaps prompted by this Court's decision in *Jensen*, *supra*, holding that a State compensation statute could not constitutionally be applied to an injury sustained on a gangplank between a vessel and wharf.

*own terms * * * any remedies against the employer for injuries inflicted on shore.*

Id. at 7. (Emphasis added.)

3. The recent case of *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, relied on by petitioner (Pet. 7), is consistent with this result. There, the Court, in agreeing with the Deputy Commissioner, held that an injury to an employee on an uncompleted vessel is not excluded from the Act's coverage merely because also covered by State law. The general purposes of the Act as seen by the Court were: (1) to insure that all maritime injuries are covered by some compensation act; and (2) to eliminate uncertainty in the choice of remedy. 370 U.S. at 119–122. Neither of these objectives is contravened by the holding of the lower courts here, since that holding, in accord with forty years of administrative practice, see 1927 A.M.C. 1558, 1855 (Opinion Nos. 5, 16), merely reaffirms the long-standing rule in an area always covered by State workmen's compensation acts. So far as the scope of the Longshoremen's and Harbor Workers' Compensation Act is concerned, this Court (in *Calbeck*) concluded that Congress intended to include any injuries whose coverage under State law was rendered questionable by *Southern Pacific Co.* v. *Jensen, supra, Knickerbocker Ice, supra,* and *W. C. Dawson & Co., supra.* 370 U.S. at 126. None of those cases involved pierside injuries; none of them cast doubt on the

rule that piers are merely extensions of the land.[4] The issue in *Calbeck* was explicitly confined to the question of coverage *vel non* of an injury that took place on an uncompleted vessel concededly afloat on the navigable waters. The holding that Congress intended the federal act to apply in that situation does not suggest that the Court was abandoning the settled standards for determining the logically anterior and statutorily distinct jurisdictional question whether the incident occurred "upon the navigable waters" at all.

4. Petitioner has cited no conflict among the circuits on this point, and we have found none. Quite the contrary, the major maritime circuits are in accord, for the Second, Fourth, and Ninth Circuits have reached the same conclusion as the Fifth Circuit below. *Johnston* v. *Marshall,* 128 F. 2d 13 (C.A. 9), certiorari denied, 317 U.S. 629; *Houser* v. *O'Leary,* 383 F. 2d 730 (C.A. 9); *Michigan Mut. Liability Co.* v. *Arrien,* 344 F. 2d 640, 644 (C.A. 2) (dictum), certiorari denied, 382 U.S. 835; *American Export Lines, Inc.* v. *Revel,* 266 F. 2d 82, 84 (C.A. 4) (dictum).[5]

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[4] The Court in *Dawson* characterized the *Nordenholt* case, *supra*, as relating "to a claim based upon death which resulted from injuries received by the longshoreman while on the dock—a matter never within the admiralty [tort] jurisdiction." 264 U.S. at 227.

[5] Four other cases raising this issue are now pending in the Fourth Circuit. *Johnson* v. *Traynor*, No. 10298; *Klosek* v. *Traynor*, No. 10299; *Avery* v. *Oosting*, No. 10323; *Marine Stevedoring Corp.* v. *Oosting*, No. 10060. That court has ordered rehearings *en banc* in these cases in February 1968.

We therefore suggest that the petition for a writ of certiorari should be denied. If, however, the petition for a writ of certiorari in *McCollough* v. *The Travelers Ins. Co.*, No. 788, this Term, should be granted, we would not oppose granting the petition in the instant case. If the Court determines that the application of the federal Act to pierside injuries is an issue which warrants its plenary consideration, the instant case presents the matter in its typical context.

Respectfully submitted.

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